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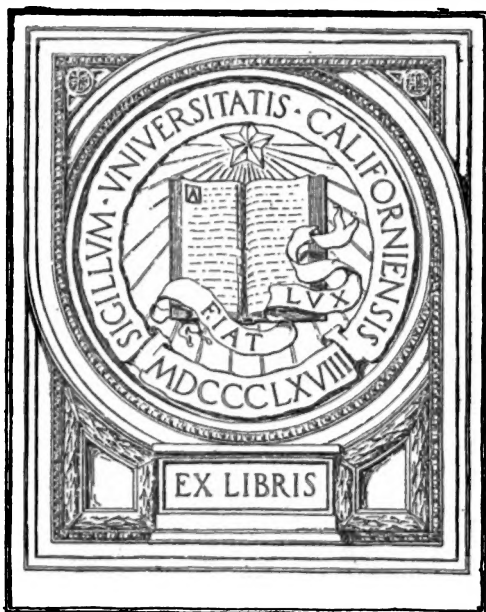
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PHILADELPHIA REPORTS.

VOL. IX.

CONTAINING

DECISIONS PUBLISHED IN

THE LEGAL INTELLIGENCER,

VOLS. 29, 30 AND 31.

PHILADELPHIA:

J. M. POWER WALLACE, 132 SOUTH SIXTH ST.

1875.

ALBION

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DECISIONS
OF THE
District Court of Philadelphia,
CONTAINED IN THE
LEGAL INTELLIGENCER, VOLS. 29, 30, 31.

District Court, Philadelphia.

[Leg. Int., Vol. 29, p. 44.]

BELL vs. HARTMAN.

The right of rescission cannot be exercised until every practical means have been taken to restore things to their original position.

Plaintiff upon the facts in this case not entitled to a reconveyance.

Purchaser is not obliged to make inquiries as to the title from one who, by deed duly acknowledged, has emphatically declared that his interest is at an end.

Rule for a new trial and motion for judgment on points reserved.
Opinion delivered *January 27, 1872*, by

HARE, P. J.—This case arises out of an agreement under seal between the plaintiff, Thomas Bell, of the one part, and one Henry B. Lyons of the other. The material words of the instrument are as follows:

“The said Henry B. Lyons, being the owner of a lease for a certain stone quarry, situate near Chester, Delaware county, given by James Swing to said Henry B. Lyons, for three years from March 1, 1869, and also of a stone business carried on at 707 Sansom street in the city aforesaid, for the consideration hereinafter mentioned, doth for himself, his heirs, executors and administrators, covenant with the said Thomas Bell, his executors, administrators and assigns, that he, the said Henry B. Lyons, will and by these presents does dispose of and convey unto the said Thomas Bell, a full and undivided one-half interest in said stone business, for the full and unexpired term of said before mentioned lease, under the terms and conditions as mentioned in said lease. In consideration whereof, the said Thomas Bell doth for himself, his executors and administrators, covenant and promise with and to the said Henry B. Lyons, his executors, administrators and assigns, to forthwith convey by proper deed of conveyance unto the said Henry B. Lyons all that certain lot or piece of ground, with the improvements thereon erected, situate No. 1717 Federal street, in the Twenty-sixth ward of the city aforesaid, clear of all incumbrance other than a ground-rent of forty-

four dollars per year. And also all that certain lot or piece of ground with the improvements thereon erected, situate No. 1724 Afton street, in the Twenty-sixth ward, city aforesaid, clear of all incumbrance other than a certain yearly ground-rent of thirty-six dollars per year. The said Thomas Bell is also to give to the said Henry B. Lyons, on the signing of this agreement, his promissory note for five hundred dollars, payable in ninety days from this date, which, as soon as the money is raised thereon, is to be placed in bank to the credit of the firm as working capital."

It is important to observe, that while this agreement is executory on one side it is executed on the other. "The said H. B. Lyons doth for himself, his heirs, executors and administrators, covenant with the said Thomas Bell, his executors, administrators and assigns, that he, the said H. B. Lyons, will and by these presents does dispose of and convey unto the said Thomas Bell, a full and undivided one-half interest in said lease, and a full and undivided one-half interest in said stone business." Obviously nothing more was requisite on the part of Lyons. He might possibly be called on to execute a formal assignment by way of further assurance, but an undivided moiety of his interest under the lease and in the stone business vested in Bell immediately on the sealing of the agreement.

It is on the other hand equally plain that Bell was bound to execute a conveyance of the premises which were the consideration of the transfer made by Lyons. This duty was, according to the terms of the agreement, absolute, and to be fulfilled without delay. Accordingly, the parties called on Mr. Clement, who seems to have been Bell's conveyancer, and asked him to draw the deed. Clement objected to have the deed drawn to Lyons on the ground that certain things remained to be done by him, and it was then suggested that Buck, who occupied an office in the same building, should be the grantee, subject to an agreement on his part to convey to no one without the joint authority of Bell and Lyons. Mr. Clement does not inform us what Lyons had left undone; and his statement is contradicted by Buck, who says that he took the title exclusively for Lyons.

Bell went into possession of the stone quarry under the agreement, and proceeded to carry on the business which had been prosecuted by Lyons. There is evidence that it was not unprofitable, and might with care and attention have yielded an income. But he soon became dissatisfied with Lyons, and was, if we may believe the witnesses, remiss and indolent himself. What his grounds of complaint were we are not distinctly told, but one of them seems to have been that Lyons did not give sufficient time and attention to the business of the firm. It is also alleged that he was in arrear to the hands at the stone quarry, and that they refused to work for Bell unless their demands were paid. But it cannot be pretended that this was a defect of title invalidating the sale, and Bell might obviously have engaged other workmen to excavate the stone. The result was a determination on his part to rescind the contract and resume possession of the land which he had conveyed to Buck.

In the meantime other events had occurred which led directly to this suit. Lyons was indebted to Morris and agreed to convey the land

which he had purchased from Bell in payment. He said that Buck held the title for him and would give a deed. Morris called on Buck, who confirmed this statement. It was accordingly agreed that a deed should be prepared and executed by Buck. Nothing was said at this time that could indicate the existence of an obstacle; but at a subsequent meeting at the Recorder's office, Morris was informed by Buck that Clement, who was confined to his house by illness, had a claim for fees, and that Buck would not convey until this demand was satisfied. Morris promised in reply to see that Clement got his money, and Buck then executed the deed. It does not appear that the sale by Lyons to Morris and the consummation of it through the deed from Buck were communicated to Bell. But this does not necessarily imply bad faith on the part of Lyons. Bell was in possession of the quarry and engaged in carrying on the business, and Lyons might therefore think himself entitled to the equivalent for which he had stipulated. On learning what had occurred, Bell was, however, much dissatisfied, and determined to test the validity of the transaction by an ejectment. The suit was brought against Ross, who having bought from Morris with notice of Bell's claim, must stand or fall by the title of his vendor.

The case was left to the jury, who found a verdict for the plaintiff, subject to two points reserved. One, had Bell any equity to a reconveyance? the other, if such an equity existed was there any evidence of notice to Morris? On both points the court are of opinion with the defendant.

Looking solely to the agreement by which the rights of the parties were originally defined, the first point does not admit of a doubt. In putting his hand and seal to the instrument, Lyons did all that was requisite to entitle him to a conveyance. It operated, as I have already stated, as an immediate assignment of an undivided moiety of his interest in the lease to Bell, who showed that he so understood it by going into possession as a joint owner. What right then could he assert to the land conveyed to Buck? It is true that Lyons had a further duty to perform, which, according to Bell, was not fulfilled. Giving the weight to this evidence which it may be thought to want, still this duty was not a condition precedent to the obligation on Bell's part to convey. The partnership and all that it implied was to succeed the transfers made on either side.

It is said, however, that when the parties met in the office of Mr. Clement, the agreement was varied by a stipulation that Buck should hold the title as a security that Lyons would render faithful and efficient service as a partner. To vary a covenant by parol there must be, first, a consideration; next, if the title to land is involved, evidence to take the case out of the statute of frauds; and finally, the new agreement must be sufficiently certain to enable a chancellor to ascertain how far and on what points it has superseded the old. In the present instance it is not easy to discover the consideration for the alleged waiver on the part of Lyons. He had a vested equitable interest which might have been enforced by a suit for a specific performance. If this right was good against Bell it was equally good against Buck, to whom Bell had conveyed with notice of the articles of agreement. Why should Lyons agree to postpone this right indefinitely by a stipulation

that it should not be enforced without the consent of Bell? It cannot be said that he was a gainer by the change, or that it could be a source of injury to Bell. There was consequently nothing on either side that could serve as a consideration. The strong presumption is, that the conveyance was made to Buck to avoid the judgments which were outstanding against Lyons. If so, the deed to Morris was in entire accordance with the obligation which had devolved on Buck as a trustee.

There is another consideration which must not be overlooked. When a deed is made to A for the purpose of giving effect to a covenant to convey to B, the latter has an equitable estate which cannot be surrendered by any means less certain than those through which it was acquired. It does not do to allege an oral trust in favor of the grantor, because such evidence is excluded by the statute of frauds. To admit it would give occasion for the evils against which the Legislature meant to guard.

Moreover, the alleged trust is not sufficiently definite to control Lyons' right to a conveyance under the articles of agreement. A sealed instrument cannot be varied by parol at common law. The case of *West vs. Blakeway*, 2 M. & G. 729, shows the inflexible severity with which this rule is enforced in England. Relief may no doubt be given in equity to a party who has changed his position for the worse on the faith of an assurance that the covenant need not be observed. But this course should not be adopted unless the new agreement is made out with sufficient distinctness to afford a certain guide. The court will not leave the sure basis of the sealed instrument unless they are satisfied that in so doing they will give effect to a purpose, which, if not ascertained with equal clearness, is at least established beyond a reasonable doubt. Can this be said in the present instance? How long was Buck to hold the title and as a security for what? The partnership between Bell and Lyons might endure for many years; was the trust to await the termination of the partnership? Buck was not to convey without Bell's assent. Did this entitle Bell to withhold the estate arbitrarily from Lyons? Unless these questions can be answered satisfactorily, a chancellor should obviously permit the law to take its course.

If the points upon which I have touched were all with the plaintiff, it would still be requisite to show that there was a failure of consideration entitling him to rescind the contract, and that he took the necessary steps for that purpose. The only evidence on the former head is, that Lyons did not give his time and services as a partner. The testimony on this point, which is extremely vague, is met by a countercharge that there was a want of diligence on the part of Bell. It is not necessary to weigh these conflicting allegations. The good conduct and fidelity of Lyons were not conditions precedent to his right to a conveyance agreeably to the articles under seal; and if we regard this as varied by what took place in Clement's office, still the failure of consideration was merely partial, because Bell was in actual possession as assignee of an undivided moiety of a lease. He could not, therefore, bring an ejectment to oust Lyons or those claiming under him, without returning or tendering what he had received. The right of rescission is *summi juris*,

and cannot be exercised until every practicable means have been taken to restore things to their original position.

The second point, whether there was any evidence of notice to Morris, is equally clear. The statement of Lyons that Buck held the title for him was corroborated by Buck. The only impediment alleged by the latter that Clement had not been paid ceased when Morris assumed the debt. The case might seem to be within the doctrine of *Sergeant and Ingersoll*, 7 Barr, 340, 3 Harris, 343, that he who purchases an imperfect or inchoate title must abide by the case of his vendor. This principle is, however, limited by another which pervades the whole doctrine of notice, and is clearly recognized in the opinion of Ch. J. Gibson. All that the law requires from a buyer is, that he shall take every practicable means of ascertaining the true state of the title. If such an inquiry does not lead to the discovery of anything that forbids the purchase, he may buy with safety. In the case before us Morris consulted the equitable owner and the holder of the legal title and was informed by both that the way was clear.

If he examined, as it may be presumed that he did, the agreement under seal, it corroborated their assertions. He certainly had no reason to inquire of Bell, who had declared in the most emphatic way, by a deed duly acknowledged and recorded, that his interest in the transaction was at an end. To infer notice under such circumstances would be equally against law and common sense.

The result is judgment for the defendant on the points reserved.

Aaron Thompson, Esq., for plaintiff.

Charles E. Morris and T. Bradford Dwight, Esqs., for defendant.

[Leg. Int., Vol. 29, p. 108.]

HOPKINSON vs. LEEDS.

The sheriff is liable for the custody of a defendant taken in execution under a *ca. sa.*, although the defendant is afterwards discharged by the decree of an insolvent court. The creditor has two concurrent remedies, and his appearance as a claimant in bankruptcy against the defendant does not affect his right to proceed against the sheriff for the escape.

Opinion delivered March 30, 1872, by

HARE, P. J.—This is an action of debt against the sheriff for having suffered and permitted one P. F. Cooper, whom he had taken in execution under a *ca. sa.* issued by the plaintiff, to escape from his custody without the plaintiff's license or consent. The defendant pleaded *nil debet* and two special pleas.

The first of these pleas avers that after the said time when, etc., and before suit brought, the said P. F. Cooper filed his petition in bankruptcy in the District Court of the United States, that the proceedings in the said court resulted in his discharge, and that the plaintiff subsequently proved the debt for which the *ca. sa.* issued as in the declaration mentioned before a register in bankruptcy, and received a dividend thereon of one hundred and fifty-seven dollars and fifty cents from William Vogdes, Esq., the bankrupt's assignee.

The second special plea is substantially as follows: That the said P. F. Cooper was retaken by the sheriff, to which arrest he voluntarily

submitted, and thereupon applied to the Court of Common Pleas for relief as an insolvent debtor, and that such proceedings were had in the said court that he was discharged from arrest, custody and confinement, under the said writ of *capias ad satisfaciendum*.

It was contended on behalf of the former plea, that no man could assert two distinct and inconsistent rights or adopt different and irreconcilable remedies. The foundation of the plaintiff's claim as set forth in the declaration was, that he had lost his remedy through the laches of the plaintiff in releasing Cooper from the arrest. By appearing before the register in bankruptcy and receiving a dividend from the estate the plaintiff admitted that the original demand was still in force notwithstanding the escape. This was an election to look to the defendant in the execution which discharged the sheriff.

A passage in Watson's Law of Sheriff, p. 141, gives some color to this argument. It is there said, "that if the defendant returns to prison after a permissive escape the plaintiff may treat him as in execution; but it seems that he would thereby waive his action against the sheriff."

All that the books cited to sustain this position can be said to establish is, that if the defendant be set at large under these circumstances by a subsequent sheriff, the plaintiff must choose which he will sue, and cannot treat the defendant as having remained in custody for the purposes of one action while alleging in another that he escaped. Such a case would be an eminently proper one for the doctrine of election as defined in *Smith vs. Hudson*, 4 Term, 211. But it bears no analogy to the present, where the alleged incongruity consists in proceeding simultaneously against the debtor and the sheriff. The authorities render it very clear that taking the defendant in execution does not satisfy the debt, and is merely a means whereby the plaintiff may obtain the amount due: *Bloomfield's Case*, 5 Rep. 870. "His body, says Lord Coke, is taken in execution to the intent that he shall satisfy, and when the defendant pays the money he shall be discharged." It was accordingly adjudged in the Common Pleas between *Linaere vs. Rhodes*, that notwithstanding the consor in a statute staple be taken and escapes, yet his goods and lands may be extended on the same statute; because the escape and the action which the plaintiff has against the sheriff for the escape are no satisfaction for the debt. It therefore follows, that an escape through the supineness or sufferance of the sheriff will not preclude the plaintiff from arresting the defendant under a new writ or levying on his goods: *Ridgway's Case*, 3 Rep. 52, a. Thus it is said, in the Notes to *Boyton's Cases*, 3 Rep. 43, that "if it be a permissive or voluntary escape the sheriff cannot retake and is subject to an action for false imprisonment if he does, yet the judgment remains in force, and the plaintiff may either bring debt (*Huxton vs. Hone*, 1 Shower, 174) or *seire facias* (*Allanson vs. Butler*, 1 Lev. 111) on the judgment, or he may retake him by a new *capias ad satisfaciendum*, or issue any kind of execution on the judgment as if the defendant had never been in execution."

So the sheriff may retake or maintain an action over against a defendant who has escaped through his negligence, and although such an action will not lie where the sheriff suffers the defendant to go at large, and is obliged in consequence to pay the debt: *Pitcher vs. Bailey*,

8 East; this is on the ground of public policy that an officer shall not recover where the case has its inception in his own wrong. It results from these authorities that a creditor has on the escape of the defendant from execution a two-fold remedy—against the sheriff on the one hand for his wrong or negligence, and to obtain satisfaction on the other from the defendant's land or goods, or by taking his body in execution. The general rule with regard to concurrent means of redress is, that both may be pursued to judgment, although there can be but one satisfaction, and there is nothing in the case at bar to exempt it from the operation of this principle. There is no repugnancy or inconsistency in suing for the debt, and for the escape by which the collection of the debt was delayed or prevented. The sheriff is certainly the last person to object to a course which is the only one that can relieve him from liability. The creditor is entitled to satisfaction but can go no further, and payment by either party will discharge the other.

The point arising on the second special plea would demand consideration if the question were an open one, but it seems to have been disposed of in *Smith vs. The Commonwealth*, 9 P. F. Smith, 320, 328. Agnew, J., there said that the sheriff is bound for the *salva et arcta custodia* of the defendant in the execution.

His liability becomes fixed if this obligation is not fulfilled, and it is no answer that the prisoner is subsequently discharged by the decree of an insolvent court. Such a doctrine would encourage laxity of duty or collusion, and expose the sheriff to temptations which it is the policy of the law to exclude.

Judgment for plaintiff on the second and third pleas.

J. Cooke Longstreth, Esq., for plaintiff.

Geo. Junkin and Charles Gilpin, Esqs., for defendant.

[Leg. Int., Vol. 29, p. 149.]

NORRIS vs. MAITLAND.

An action of assumpsit against two cannot be sustained on an instrument under seal signed by one containing no agreement to bind the other.

A covenant by one on behalf of himself and others to pay money in a matter of common interest does not purport to bind any but the covenantor.

Prevention in many cases is equivalent to performance.

Opinion delivered April 27, 1872, by

HARE, P. J.—This is an action of assumpsit against Joseph Maitland and E. V. Maitland, on the following agreement under the hand and seal of E. V. Maitland:

Memorandum of agreement made the day of January, A. D. 1865, between Edward V. Maitland, of the first part, and William C. Norris, of the second part, witnesseth, that the said party of the first part, in consideration of the services rendered and to be rendered by the said party of the second part, in obtaining certain title papers to land, doth hereby agree to pay to the said party of the second part five hundred dollars for service already performed, and five hundred dollars for his expenses on the journey, now about to be undertaken, and in the event of the said party of the second part obtaining the title papers necessary to carry the matter into effect, so that the sale of the lands now made

shall be perfected and the money received from the purchasers therefor, then the said party of the first part agrees, on behalf of himself and the other parties interested, to pay the party of the second part the further sum of five thousand dollars, but in case the present sale shall by any means fall through, then the said party of the first part, in the event of a sale to any other party, made by the aid of the papers so to be obtained by the party of the second part, agrees to pay the said party of the second part the said sum of five thousand dollars, on the perfection of the said second or other sale and receipt of the money therefor. In consideration of all which the said party of the second part agrees to use his best and utmost endeavors and diligence to obtain and bring the said papers safely to the said part.

Witness the hands and seals of the said parties.

E. V. MAITLAND, [SEAL.]

Witness, JOSHUA SPERING, [SEAL.]

It appeared in evidence that the proposed quest for the title papers, which involved a journey to Richmond during the rebellion, was undertaken at the instance of both the defendants, but it was shown by the same testimony that the agreement was advisedly made with E. V. Maitland, in order that the name of Joseph Maitland might not appear in the transaction.

Three points were made by the defendants' counsel: That the agreement being under seal would not support assumpsit. That a joint action would not lie against Joseph Maitland and E. V. Maitland on the sole obligation of E. V. Maitland. That the time had not arrived for the fulfilment of the contract; there being no proof or allegation that the sale had been perfected or the purchase-money received from the vendees.

We do not think it necessary to dwell on the first objection. It may be conceded that if A, acting under a parol authority, assumes to bind himself and B by a sealed agreement, it may be a sufficient ground in Pennsylvania for an action of assumpsit against both. But it should at least appear that if B is not a party to the agreement, the intention was that he should be under an immediate personal obligation to the covenantee. A covenant by A to pay on behalf of B, or even that B shall pay, does not impose any direct liability on B. He may be bound to indemnify A, but an action cannot be sustained against him by the covenantee. Whether a court of equity would on proof that the consideration for such a covenant moved to A and B, and that B is insolvent, fasten the debt primarily on him, need not be considered here. Such a decree might be founded upon the analogy of the decisions, which establish that the bankruptcy of the surviving members of a firm will authorize a recovery against the personal representatives of the deceased partner.

In the present instance it is very clear that the instrument in suit does not purport to be the covenant of Joseph Maitland. It is not signed or sealed by him, or by any one for him. The intention which it discloses is to contract with E. V. Maitland and with him alone. It is expressly declared to be between E. V. Maitland of the first part, and the plaintiff of the second part, and the promise to pay five thousand

dollars is by the party of the first part, or in other words by E. V. Maitland. It is true, that he covenants for himself and on behalf of the other parties interested, but this does not make it their covenant, and simply indicates that he pledged his credit for their benefit. It is laid down in *Bond vs. Aiken*, 6 W. & S. 165, that if a partner gives his bond for a cotemporaneous loan, assumpsit will not lie against the firm, although the money was borrowed on partnership account, and used for partnership purposes. Sergeant, J., said there was no room for an implied promise by both the defendants, and the express promise was only by one. It could not, therefore, be made the ground of a joint action. In this instance the consideration was money lent, but the principle is the same where one partner or joint owner covenants to pay for a service rendered to all.

The remaining point is also against the plaintiff. He undertook to procure the title papers for a fixed sum, which has been paid, and a contingent fee depending upon a future and uncertain event, which disappointed his expectations. The sale was not perfected nor was the money received from the purchasers. The plaintiff concedes that this is a sufficient answer *prima facie*. But it is alleged that the defendants themselves prevented the performance of the condition, by entering into an agreement of record that the purchaser should be discharged and other persons substituted in their place. It is a long and well established doctrine, that prevention is equivalent for many purposes to performance, and if the plaintiff had shown that the purchasers were ready and willing to pay, and that the defendants refused to receive the price, it would have been a sufficient reply to the objection. What the evidence really discloses is, that the purchasers were so far from being prepared to fill the obligation on their part, that they filed a bill to rescind the contract on the ground of a defect of title, and that the suit was finally compromised by the agreement to which I have referred. It would appear obvious that the vendors might under these circumstances make the best bargain in their power for themselves and the plaintiff without becoming liable to him. Their own interest was a sufficient guarantee that they would not wilfully sacrifice his. But we are not left on this point to conjecture; the difficulty was anticipated and provided for in the contract between the plaintiff and E. V. Maitland. It is there stipulated that "in case the present sale shall by any means fall through, then the said party of the first part, in the event of a sale to any other party, agrees to pay the said party of the second part the said sum of five thousand dollars on the perfection of the second or other sale and receipt of the money therefor." "Falling through" is a term not susceptible of a precise definition, but it is certainly broad enough to comprehend the failure of a contract of sale through the refusal of the buyers to pay the price. If this occurred, the defendants were to expose the property again for sale, and were not to be liable to the plaintiff unless the transaction resulted in the actual receipt of the money.

On the whole we are of opinion that the plaintiff failed to make out a case for the jury, and the motion to take off the nonsuit is accordingly dismissed.

E. Spencer Miller, Esq., for plaintiff.

R. C. McMurtrie, Esq., for defendant.

[Leg. Int., Vol. 29, p. 300.]

MOUNTJOY vs. METZGER.

The unqualified refusal of a party to a contract to perform it when the time arrives, announced before such period, is a breach, and suit may be commenced at once.

A rule for a new trial. Opinion delivered *September 16, 1872*, by
HARE, P. J.—The cause of action arose out of the following contract:

PHILADELPHIA, *April 14, 1869.*

Sold for account of George Mountjoy to Henry Metzger, through F. A. Dilworth, five hundred (500) barrels refined petroleum; net gauge to average not less than forty (40) nor more than forty-six (46) gallons; color standard, white or better. Burning test, 110° Fahrenheit, or upwards; deliverable in warehouse in Philadelphia, in prime shipping order, between the present date and the 31st or last day of December, 1869, both days included, at buyer's option, and to be paid for on delivery at the rate of thirty-eight and one-half (38½) cents per gallon, cash, packages included.

Should delivery be required before maturity of this contract, fifteen (15) days' notice must be given by buyer to seller, all of which must be within the time above specified.

Signed in duplicate.

Brokerage 11-20ths of one per cent. by seller.

D. L. MILLER, JR., Broker.

[10-cent Int. Rev. Stamp cancelled.]

Accepted—HENRY METZGER.

Mountjoy subsequently assigned his interest in the contract to Holbrook. The buyer did not exercise his option, and the agreement consequently became absolute on his part to accept and pay for the oil on the 31st of December. On that day Holbrook tendered the oil to the defendant. The price had fallen, and it was therefore as much the interest of one party to evade as it was that of the other to enforce the obligation. Accordingly, the tender was peremptorily declined. Metzger said that Mountjoy was in prison and could not have fulfilled the agreement if oil had risen. He could not, therefore, reasonably expect the defendant to comply. The tender was all right, but he, Metzger, would neither take the oil nor pay the difference. Holbrook then said that he supposed he was bound to sell the oil at auction. If, however, the defendant was willing, he would place it in the hands of Mr. Foster, to be disposed of at private sale. Metzger replied that he had no objection. Holbrook thereupon sold the oil at once through Foster for 31½ cents per gallon, and a suit was instituted to his use on the same day, for the difference between this amount and the contract price.

The jury were instructed that the writ was prematurely issued, unless the defendant had waived his right as originally fixed by the agreement. If, however, he refused absolutely to take the oil, and assented to the defendant's suggestion that it should be sold forthwith, as a means of liquidating the damages and fixing the rights and liabilities of the parties, the cause of action was complete immediately on the sale, and a suit brought subsequently on the same day would not be too soon.

The charge was accepted to, and is now before us for consideration. It is said on behalf of the defence that when an agreement is made for the sale of merchandise deliverable at a future day, the purchaser has the whole of the day to accept and pay for the goods, and the vendor to deliver them. Hence the contract cannot be broken on either side before night, and a writ issued on the same day is premature.

The plaintiff replies, that while this is true as a general proposition, still a declaration that the purchaser will not accept or pay for the goods is a breach for which redress may be sought immediately by suit.

The question was critically examined in *Hochter vs. De La Tour*, 2 Ellis and Blackburn Reports, 678. The declaration averred a mutual agreement on the 12th of April, 1852, that the plaintiff should serve the defendant as a courier for three months from a certain day then to come, to wit, the 1st of June, 1862. That the plaintiff was ready and willing to comply with the agreement, but that the defendant afterwards, and before the said 1st of June, wrongfully refused and declined to employ the plaintiff, and wrongfully absolved and discharged him from the said agreement and from the performance thereof, and from being ready and willing to fulfil the same; and that the defendant then and there wholly broke, put an end to, and determined his said promise and engagement. It appeared from the evidence given at the trial that the agreement was made as alleged in the declaration. That on the 11th of May, 1852, the defendant wrote to the plaintiff that he had changed his mind and would not take the plaintiff into his service. The latter thereupon brought suit on the 22d of May, and subsequently during the same month obtained an engagement with Lord Ashburton, on equally good terms, but not commencing until the 4th of July. The defendant contended that the suit was prematurely brought, if not radically defective. There could not be a breach before the time designated for performance, nor could a contract be enforced by any one who did not hold himself in readiness to fulfil his part. By taking an engagement from Lord Ashburton in May, the plaintiff had disabled himself from entering the defendant's service on the 1st of June.

Mr. Justice Erle reserved the point; and the case was subsequently argued before the court in banc, on a rule to show cause why a nonsuit should not be entered or the judgment arrested. The defendant's counsel alleged that to constitute a breach of contract, something must be left undone which the promisor agreed to do, or something done which he promised to avoid. Saying, beforehand, that he does not intend to fulfil the agreement, is not a breach, because he may change his mind when the time for performance arrives. The injury inflicted by the defendant's declaration that he would not employ or pay the plaintiff, was prospective, not actual, and could not be made the foundation of a suit. The plaintiff was entitled to nothing under the contract until the day appointed for its fulfilment. In reply, the plaintiff's counsel insisted on the hardship that would result if a vendor who agrees to deliver goods at a future day were obliged to hold them in the face of a falling market, notwithstanding a notice that the buyer would not fulfil the contract: or if a manufacturer who has entered on the fulfilment of an order which is unjustifiably revoked, must proceed on pain of forfeiting the right to compensation for what he has already done.

Lord Campbell said, in delivering judgment, that it was established under the authorities, that if a man disabled himself from performing the contract, although before the time appointed for its fulfilment, there was a breach for which the other party might proceed forthwith. The law had been so held where a man who had promised to marry at a future day took another woman as his wife during the interval. So a tenant might sue at once if the landlord precluded the fulfilment of his promise to renew the lease, by letting the premises to a third person before the expiration of the term.

The principle was analogous where the refusal of one party to perform the contract took away the only ground on which the other could reasonably be expected to hold himself in readiness to fulfil his part of the agreement. An author who had promised to write a book could not be expected to go on with the work, after being informed that the publisher would not defray the cost of printing it, or pay the stipulated compensation. In like manner the plaintiff could not justly be required to keep himself disengaged in order to be able to attend on the defendant, after being told that the latter did not need and would not accept his services. It was obviously for the interest of both parties—of the party who refused to fulfil the contract, and of the party to whom the refusal was addressed—that the latter should be permitted to reduce the damages, by taking his skill and time to the best market instead of charging the other with the whole weight of the obligation which he had renounced. The principle was again applied in *Zenos vs. The Black Sea Co.*, 18 C. B. N. S. 825.

These decisions go further than the plaintiff's case requires.

The verdict may be sustained without holding that a contract is necessarily broken by a declaration that it will not be fulfilled. It is enough to say, that a breach will occur, if such a declaration results in a loss for which compensation should be made in damages. It may well be that a purchaser who has announced that he will not pay the price, may change his mind and claim the goods, if they are still on hand when the day arrives, and susceptible of being delivered. If this is conceded, it must follow that such a retraction on his part would preclude a recovery by the vendor, who could not be entitled to damages in the absence of loss. But the case is widely different where the goods are sold in consequence of the purchaser's declaring that he does not want and will not pay for them. The transaction is then brought to a point which does not admit of change; and as the damages are liquidated, it would obviously be unjust to delay the remedy. This argument applies with peculiar force when the purchaser rejects the goods when tendered at the time prescribed.

It cannot be said that such a refusal is a mere declaration of intention as distinguished from an actual breach. It is no doubt true that the parties have the whole of the last twenty-four hours during which to perform the agreement. Hence a buyer to whom the goods are offered at noon may require the vendor to keep them in readiness till night, to give him time to procure and pay the purchase-money. But an unqualified refusal on his part is an irreparable breach which leaves no room for a subsequent change of purpose. It is an implied authority to the vendor to dispose of the property to the best advantage, and charge the purchaser with the difference.

In the present case, however, we are not left to inference, because the question, whether the goods should be sold at private sale, was put to the defendant and answered affirmatively. He is therefore estopped from alleging that it was the duty of the plaintiff to wait till the next day before treating the contract as determined.

A question remains of some importance. Conceding that the contract was irrevocably broken, by the refusal of the defendant to take the oil, could the plaintiff sue at once, or was he bound to wait until the following day? If the first impression is in favor of the necessity for delay, it will, I think, disappear on investigation. It is no doubt true in general, that a suit will not lie on the day on which default is made in the performance of a pecuniary obligation. The cause of action is not complete on a promissory note until the morning after the last day of grace; and the principle is the same in the case of a bond. This is not because a man who is injured cannot seek redress immediately by suit, but because non-performance is not an injury until the time for fulfilment has expired. If a man removes or converts the goods of another, the latter may proceed at once in trover or replevin; and so where a vendor refuses to deliver the goods notwithstanding a tender of the price. In like manner a man who should promise to pay a sum certain at noon on a given day, could not complain that a writ issued the next hour was premature. It follows that when a purchaser refuses absolutely to accept or pay, the vendor may proceed forthwith in debt or assumpsit. The rule that there are no parts of a day is designed like other legal fictions for the furtherance of justice, and does not apply where the effect would be to frustrate or delay an undoubted right. It is distinctly in proof that the plaintiff did not issue the writ until the damages were liquidated by the sale of the oil; but if it were needful, this might be presumed in aid of the remedy, and to obviate the expense and delay of another suit.

Since the above was written our attention has been called to the case of *Frost vs. Knight*, published in the *Legal Intelligencer* for August 30, 1872. It was an action for a breach of promise of marriage. The defendant, who had agreed to marry the plaintiff whenever his father died, declared, during the lifetime of the latter, that he was unalterably determined not to fulfil the contract, and it was held by the Exchequer Chamber (reversing the judgment of the court below) that the plaintiff might regard the promise as broken, and sue for and recover such damages as would have arisen from the non-fulfilment of the agreement at the time prescribed, subject to abatement in respect of any circumstances that might have afforded a means of mitigating the loss. The doctrine may therefore be regarded as established in England, and from its intrinsic reasonableness will, in all probability, prevail in the United States.

Rule discharged.

J. T. Pratt and R. P. White, Esqs., for plaintiff.

J. H. Sloan and John Goforth, Esqs., for defendant.

[Leg. Int., Vol. 29, p. 148.]

ANDERSON vs. HENSZEY.

The Common Pleas may appoint a successor to a trustee appointed by will, where it is a distinct and collateral trust and can be exercised independently of the executorship.

Opinion delivered April 27, 1872, by

HARE, P. J.—This is an action of *sci. fa. sur mortgage*. In the year 1852 Wm. B. Hood was appointed trustee under the will of Wm. Hyneman, deceased, by the Court of Common Pleas, and this appointment was confirmed by the Orphans' Court in May, 1856. During the interval he collected a mortgage belonging to the estate, but failed to account for the proceeds to the *cestui que trusts*. It is now alleged that the Common Pleas exceeded their jurisdiction in making the appointment, and that the payment to the trustee being consequently invalid did not extinguish the debt. The present suit is brought by an administrator *de bonis non* to test this question. The point was reserved at the trial, and the evidence on both sides has since been reduced to a case stated.

It is established under the authorities that the jurisdiction of the Court of Common Pleas and Orphans' Court is concurrent as it regards testamentary trusts, unless they are conferred on the executor as such or *virtute officii*. *Brown's Appeal*, 2 Jones, 337. That the same person is designated as executor and trustee is not enough to exclude the authority of the former tribunal; it must also appear that if he ceases to be executor he cannot act as trustee. *Wheatley vs. Badger*, 7 Barr, 459. In other words, the testator must have intended that in the event of a renunciation of the former office, both should devolve on the administrator *de bonis non cum testamento annexo*. Can such an inference be drawn in the present instance? To answer this question we must have recourse to the will. The material words of that instrument are as follows:

Item. I do give, devise, and bequeath unto my executors, hereinafter named, all the rest, residue, and remainder of my estate, whatsoever and wheresoever, including what may be added thereto, by the rever-
sionary interest of the property from which my wife's legacy is to arise, and including all moneys in the house or to my credit in bank at the time of my decease. To hold to them, their heirs, executors, administrators and assigns, in trust and special confidence to make leases of the real estate, and convert the personal estate into money, and place the same out at interest, secured by bond, warrant, and mortgage, on good and sufficient real estate, during all the term of the joint lives of my three sisters, Mary Young, Elizabeth Sweeney, and Sarah Mills, and during all the term of the natural life of the survivors and survivor of them, and to receive the rents, issues, and profits, interest and income thereof, and pay and apply the same when and as received.

First. To the payment of all taxes and necessary repairs to the premises, and in the next place to pay over the net surplus thereof, in equal third parts, unto my said three sisters, during all the term of

their joint lives, for their own sole and separate use, respectively so, nevertheless, that the same shall not be in the power, nor in anywise subject to the debts, contracts, or engagements of their husbands, respectively, or of any future husband that either of them may marry, and that their receipts respectively shall, notwithstanding any coverture, or whether they be covert or sole, be always deemed and be taken to be good and valid discharges in law, for the share or shares to which they are respectively entitled, and from and immediately after the decease of either or any of my said three sisters, then I do order and direct that the part and share of each of them so dying shall go, and I do hereby order and direct that the same shall be appropriated for and towards the education, maintenance, and support of all and every the child or children of such of them, my said sisters, as so die, born and to be born, until time hereinafter appointed for the final division of my estate. . . . And lastly, I do hereby nominate, constitute, and appoint my said wife, Hannah Hyneman, and my friend Caleb Carmalt, of the city of Philadelphia, conveyancer, to be executors of this my last will and testament, hereby revoking all other and former wills and testaments by me at any time heretofore made. I do declare this, and this only, to be and contain my last will and testament, and as such, desire that it may be executed by my friend, James Carmalt, brother of said Caleb Carmalt, in the case the latter shall happen to die before the same is carried into full and complete effect.

In witness whereof, I have hereunto set my hand and seal, this seventeenth day of September, in the year of our Lord one thousand eight hundred and twenty-two (1822).
W. HYNEMAN, [SEAL.]

Is there anything in this language to intimate that the testator meant the trust to be inseparably linked with the executorship? He undoubtedly selected his wife and Caleb Carmalt as the fittest persons for both offices, but it would be too much to infer from this circumstance that he intended they should not administer the estate unless they also accepted the trust. On the contrary, the fair deduction is, that while he hoped and believed that they would consent to be trustees as well as executors, it was not his design to make this a condition. If one was willing to act as trustee and the other as executor, there would be a nearer approach to the fulfilment of his purpose, than by intrusting the management of the estate to a stranger. This conclusion is strengthened by the nature of the trust, which concerned the real estate and imposed numerous duties that could not properly be brought into an administration account. It was accordingly treated as severable from the outset, with the tacit consent of the parties in interest. Letters testamentary were granted in December, 1826, to Caleb Carmalt and Hannah Hyneman, but she did not accept or enter on the fulfilment of the trust; and Carmalt acted as sole trustee until October, 1835, when he declined, and Christian Schrack was appointed in his stead by the Court of Common Pleas. Schrack gave place to Mecke in 1844, who administered the trust until he was finally superseded by William B. Hood. Hannah Hyneman continued to act as executrix for many years, and was finally discharged upon the occasion of her second marriage in 1847. We are now asked to say that these appointments and decrees,

and the acts done under them, were not only irregular, but void, and that the defendant must pay the penalty of an error, which he is alleged to have shared with every one who was concerned in the administration of the estate as judge, counsel, trustee, executor, legatee, or debtor.

Such a conclusion obviously should not be entertained unless as the result of a legal necessity from which there is no escape. If there were no other ground, we might rely on the maxim *contemporanea expositio fortissima est in lege*. *The Attorney-General vs. Parker*, 3 Atkyn's, 577; *The Bank of England vs. Anderson*, 3 Bingham's New Cases, Common Pleas, 666; 2 Smith's Leading Cases, 518, 5th ed. It should be remembered that the question of jurisdiction depends primarily on the intention of the testator as disclosed in his will, and we should be slow to disregard the construction which was given universally to that instrument at the time. Laying this aside, and treating the subject as *res integra*, it is sufficiently clear, under the authorities, that this was a distinct and collateral trust which might be exercised independently of the executorship, and if so, the Court of Common Pleas had jurisdiction.

Judgment is entered for the defendant on the verdict and under the case stated.

Thomas Greenbank, Esq., for defendant.

John K. Valentine and *Charles Gilpin*, Esqs., for terre tenant.

[Leg. Int., Vol. 29, p. 300.]

MULLEN vs. STEAMSHIP COMPANY.

1. An employer is bound to furnish to persons in his employ proper and safe machinery, tools and implements, to work with, and is responsible for injuries resulting from negligence in not doing so; but where he has discharged his duty in that respect, and the machinery or tools subsequently become defective and unsafe through the negligence of a person properly intrusted with the care and supervision of them, and a fellow-servant of such person is injured in consequence of it, the master is not responsible, if he had no notice of the defects.
2. A head stevedore employed in unloading a cargo is fellow-servant with a stevedore employed under him, within the rule which exempts the employer from responsibility for an injury suffered by a servant from the negligence or carelessness of a fellow-servant.

Rule for a new trial. Opinion delivered *September 16, 1872*, by

THAYER, J.—In this case the facts were that the plaintiff, on the 26th of October, 1870, while employed by the defendants as a stevedore, and working in the hold of the steamship *Wyoming*, owned by the defendants, was injured by the fall of two tierces of rice which were being hoisted from the hold to between decks, whence they were to have been discharged over the ship's side. The immediate cause of the accident was the parting of the rope used for hoisting. This rope had been spliced by the mate who had charge of the ship's running rigging, while coming up the river. The splice drew out without breaking, and the casks fell upon the plaintiff. At the time of the accident the chief stevedore employed by the defendants had charge of the unloading of the vessel. The question is, whether the defendants are responsible for the injury received by the plaintiff.

Although the doctrine is of recent origin, it is nevertheless now well

settled by many authoritative decisions, that when several persons are employed in the same general service, though in different parts of it, and one of them is injured through the negligence or carelessness of another, the employer is not responsible, unless he has been guilty of negligence in employing an unfit person for the service. *Respondent superior* does not apply in such cases, for the reason that the servant, by entering into the employment, has voluntarily assumed all risks which grow out of the negligence or inattention of his fellow-servant. *Caldwell vs. Brown*, 3 Smith, 453; *Frazier vs. Penna. R. R. Co.*, 2 Wright, 104; *Ryan vs. Cumberland Valley R. R. Co.*, 11 Harris, 384; *O'Donnell vs. The Allegheny Valley R. R. Co.*, 9 Smith, 239; *Weger vs. Pennsylvania R. R. Co.*, 5 Smith, 460; *Ardesco Oil Co. vs. Gilson*, 13 Smith, 147, furnish full illustrations of the rule.

But it was insisted that the defendants were responsible upon two grounds: 1st. Because they were bound to furnish proper and safe tools and appliances for the use of persons engaged in their service; and secondly, because, as it was argued, the employment of the plaintiff being in a subordinate capacity to that of the head stevedore, the plaintiff was not within the operation of the principle that the servant assumes the risk of the negligence of his fellow-servant. In other words, that the plaintiff was not a fellow-servant of the head stevedore, but subject to his control and amenable to his orders.

If a master negligently provides unsafe machinery, tools or implements, for his servant to work with, he is answerable for the consequences.

But this rule, like every other, has its just limits and qualifications, without which the rule itself would be an intolerable burden. If the master provides proper and safe machinery and tools, and employs a competent and prudent person to take charge of them, whose duty it is from time to time to inspect them, put them in order and renew their defective parts, he cannot be justly answerable for an accident to a fellow-servant, arising from the negligence of such person. Without this reasonable exception to the rule of responsibility, it would be too severe for the business relations of life, and most oppressive in its operation. It would in many cases abrogate entirely the general rule that the master is not responsible to his servant for the negligence of his fellow-servant. It would make the employer an insurer against accidents, which no foresight or prudence of his could possibly foresee or prevent, and lead to consequences, the absurdity of which was well illustrated by the learned judge who delivered the opinion of the court in *Ryan vs. The Cumberland Valley R. R. Co.*, 11 Har. 384: "When persons are employed," said he, "to work for others, are the employers bound to see that the instruments of their work shall continue to be used in safety? Then the coachman, the wagoner, and the carter, who ought to know more about the vehicles which they use than their employers do, have a practical warranty that they are in good condition, though practically they know that many of them are really worn out; the wood chopper and the grubber are insured that their axe or mattock shall not injure them by flying off the handle; the engineer, the miller, the cotton spinner, and the wood carder have a guarantee for the accidents that may befall them in the use of the machinery which they

profess to understand, and which they ought so to understand as to be able to inform their employer when it is out of order."

The particular negligence alleged in that case was in omitting to hook safely the cars of a railroad train, a species of negligence which it is difficult to distinguish in principle from that which caused the accident in the present case.

The employer is bound to furnish proper and safe machinery, but where he is obliged from the nature of the business to employ agents to run it, and to take care of it, and to keep it in proper repair, he is not responsible, unless he commits the charge to an incompetent or untrustworthy person. Upon the contrary principle, every employer must be held to warrant every bolt or pin, or screw, or piece of mechanism used, although he himself knows nothing of the machine, or does not understand its structure, or is incapable of appreciating the conditions of danger. He must be held to warrant not only that everything is good and sufficient when he supplies it, but that it shall continue so. And this not to a stranger, but to a person who is daily conversant with the risks of the business, and who, upon entering upon it, must of necessity know that his safety depends as much upon the capacity and watchfulness of his fellow-workmen as upon his own. The ship owner must be responsible to the mariner for every spar and rope which may have been weakened by exposure to the weather, although he has given the master unlimited authority to renew them. The owner of every rolling mill, furnace and factory of every description, must be subject to the same exacting rule, and if there is a warranty of the continuing sufficiency of every part of the machinery, there must also, *pari ratione*, be a warranty of the continuing fitness and vigilance of all the persons employed. Such a rule administered by juries ready always with generous damages for the unfortunate, would exceed the limits of reasonable responsibility, and would be an insufferable burthen upon all branches of commerce and manufacturing industry.

Doubtless there are some defects so patent in their nature, and so obvious to every one, that the principal will not be excused upon the ground of the negligence of his agents, even to a fellow-servant of the agent. *O'Donnell vs. The Allegheny Valley R. R. Co.*, 9 Smith, 239, is an example. In that case a person employed by the company was injured by the breaking of a rail caused by its resting upon rotten ties, and it was held that a railroad company is bound to furnish a safe and sufficient roadway to its servants, as well as others travelling over it, and that the negligence of a superintendent in not keeping the roadway in repair did not relieve them from responsibility. The remote negligence of servants does not furnish any excuse for the non-performance of such a direct and immediate duty as that. A railroad company is bound to keep itself informed upon such subjects. It is not to be likened to the case of an accident arising from a cause immediately traceable to the negligence of an employe. Such cases do not weaken but confirm the general rule.

If it can be shown that the principal was aware of defects and neglected to repair them, the negligence is his own. He cannot, in such a case, shift the burden to a subordinate; but where the defect is such that he cannot be supposed to know it until he has received notice of it,

and its existence is owing to the negligence of a person who was properly intrusted with the duty of providing against it, the employer cannot be held responsible to the fellow-servant of the latter upon any principle of reason or established law. *Ryan vs. Cumberland Valley R. R. Co.*, 11 Harris, 384; *Walker vs. R. R. Co.*, 2 H. & C. 102; *Searle vs. Lindsay*, 11 C. B. N. S. 429; *Hand's Administrator vs. The V. & C. R. R. Co.*, 32 Verm. 473; *Seaver vs. R. R. Co.*, 14 Gray, 466.

If the unfortunate accident which was the cause of the present action was caused by negligence, it is plain that the negligence was either the remote negligence of the mate in making an imperfect splice, or the proximate negligence of the head stevedore in not examining the rope with sufficient care before he commenced the unloading of the vessel. But how could the owners know anything of that, unless they were informed of it? Is a ship owner bound to examine personally every day, every rope in his ship, at the peril if he does not, of heavy damages to the persons in his employ resulting from the negligence of other persons in his employ, who are necessarily intrusted with such things? We must go to this extent if we are to hold the defendants responsible in the present case.

Nor was there anything in the position of the plaintiff which relieves him from the operation of the general rule. He was a fellow-servant in the same general employment. "We should be letting in a flood of litigation," said Baron Pollock, in *Morgan vs. The R. Co.*, Law Rep., 1 Q. B. 155, "were we to decide the present case in favor of the plaintiff. For if a carpenter's employment is to be distinguished from that of the porters employed by the same company, it will be sought to split up the employes in every large establishment into different departments of service, although the common object of their employment, however different, is but the furtherance of the business of the master."

That Corcoran, the head stevedore, was above the plaintiff, who worked subject to his orders and under his directions, makes no difference. The rule is not altered by the fact, that the servant to whom the negligence is imputed was a servant of superior authority, whose directions the plaintiff was bound to obey. A foreman has been held to be a fellow-servant with other servants whose work he superintends: *Gallagher vs. Piper*, 16 C. B. N. S. 669; *Feltham vs. England*, Law Rep., 2 Q. B. 32. An engineer and one employed under him: *Searle vs. Lindsay*, 11 C. B. N. S. 429. An under-looker, whose duty it was to superintend a mine roof, and a miner: *Hall vs. Johnson*, 3 H. & C. 589. Superintendent and hand: 6 Cush. 75. A brakeman and conductor: *Frazier vs. Penna. R. R. Co.*, 2 Wright, 104. An engineer and laborer: *Ryan vs. C. V. R. R. Co.*, 11 H. 384. A tender to stone masons and a foreman: *Weger vs. Penna. R. R. Co.*, 5 Smith, 460. There are cases in which persons have been so completely substituted in all respects to the place of the master, exercising in his stead a general and complete authority and control over the whole business, that they are regarded to all intents and purposes as principals and not fellow-servants—masters substituted in the room of other masters. But the present case cannot be likened to them in any respect.

Rule absolute.

D. Dougherty, Esq., for plaintiff.

J. V. Darling and M. P. Henry, Esqs., for defendants.

[Leg. Int., Vol. 29, p. 148.]

BARING vs. SOUDER.

QUERE.—Does a ship's husband stand in such a relation to the owners, that his ratification of a loan to the master for the use of the ship is *prima facie* evidence against them? *Semble*, no.

Rule for new trial. Opinion delivered *April 27, 1872*, by

HARE, P. J.—This is an action brought by Baring Bros. & Co., against E. A. Souder and S. T. Souder, trading as Souder & Company, Charles A. French and George B. Kellum, for money laid out and expended for their use as part owners of the barque Kedar. It appeared in evidence that French was master as well as part owner, and that Souder & Co. were the managing owners or ship's husband. French sailed in command of the barque on a voyage from the United States to Havre, and while there drew a bill of exchange on the plaintiffs as a means of raising money to be expended, as he alleged in the letter accompanying the draft, in procuring the requisite supplies for the vessel. But there was no direct proof before the jury that such a step was necessary on his part, or of the way in which he used the money. The plaintiffs having accepted and paid the bill, rendered an account to Souder & Co., charging them with the amount as expended on their behalf for the use of the vessel. The testimony of E. A. Souder, who was examined at the trial, showed that this charge was sanctioned by the firm in their capacity as general agents for the barque; but unless they had an express or implied authority to charge the owners personally, there was no evidence of ratification on the part of Kellum.

It is established under the authorities that the master may bind the owners for supplies procured for the ship, and it would appear from the cases of *Blackstock vs. Leidy*, 7 Harris, 335, and *Lincoln vs. Wright*, 11 Harris, 76, that when the nature of the articles furnished is such as to indicate that they were requisite and proper in kind and quantity, the burden of proof is on the defendants to show the contrary. But it would be too much to infer that a recovery can be had for money advanced to the master for the use of the vessel, without proof that the state of things was such as to justify the loan. To hold that the allegations of the master to the lender are sufficient to charge the owners with any amount that he may think fit to borrow, would place them at his mercy and surround the business of navigation with risks which no prudent man would like to encounter. The decisions accordingly concur that it is incumbent on a creditor who seeks to recover on such a consideration to show that there was a reasonable ground for believing that the money was needed for the use of the vessel, and would be so applied. *Cary vs. White*, 1 Brown's P. C. 284; *Wainwright vs. Crawford*, 4 Dallas, 225.

The defendants' points were affirmed in accordance with this principle, but the jury were, notwithstanding, told that if Souder & Co. were the general agents of the other owners for the management of the vessel, and ratified the loan, it was evidence on which a verdict should be rendered for the plaintiffs in the absence of contravening proof.

The case is therefore narrowed to the single point, does a ship's husband stand in such a relation to the owners, that his ratification of a

loan to the master for the use of the ship is *prima facie* evidence against them? In general, an agent cannot sanction that in another which he is not authorized to do in person. It would appear, although the research of counsel has failed to adduce any case in point, that if a ship's husband can borrow money on the credit of the owners, the burden of proof is on the lender to establish that the money went to the use of the vessel, and that the suit is only an indirect way of charging the amount originally due to the person who furnished the supplies or did the work. In other words, the lender must produce and prove the bills as if he were proceeding for goods sold and delivered. Yet it does not follow that if the ship's husband states an account on behalf of the vessel with the master, or with a third person, it is not evidence against the owners. It seems to us, on the whole, better, in the absence of any sure or guiding light, to send the case to another jury, where this point, which was overlooked on all sides at the trial, may be elucidated by the testimony of E. A. Sonder. It will then probably appear that his firm were tacitly, if not expressly authorized, to take up money for the use of the vessel, or ratify such advances when made by others.

Rule absolute.

E. Spencer Miller, Esq., for plaintiffs.

Messrs. Lane and Roney, for the defendants.

[Leg. Int., Vol. 29, p. 308.]

CARSON vs. COCHRAN.

Where a purchaser of a farm agreed to make further payment on a resale: *Held*, that he was not bound to pay until he sold, nor to sell at a sacrifice. The power of an agent is limited to his employment.

A rule for a new trial. Opinion delivered *September 21, 1872*, by HARE, P. J.—Viewing the plaintiff's case in the most favorable aspect, there is no ground for taking off the nonsuit. Agreeably to the deposition of H. Alexander, a witness called on his behalf, the defendants agreed to pay \$3000 cash, and \$2000 more whenever they resold the farm. As the property still remains in their hands for want of buyers, the contingency on which the latter payment was to be made has not occurred. It is no doubt true, that when no time is appointed, the contract must be fulfilled within a reasonable time. But this rule does not apply when the period for performance is fixed directly or by implication. In the present instance the parties obviously understood each other in a very different sense from that contended for by the plaintiff. A man who agrees to accept a fixed price, with a stipulation for a further sum in the event of a resale, takes it for granted that the purchaser will not dispose of the property until he can do so at such an advance as will enable him to comply with the terms of the contract. He might otherwise, if the purchaser proved insolvent, lose the anticipated gain. It follows that the purchaser is not bound to pay until he sells, nor to sell unless he can do so without a sacrifice.

The remaining question is one of evidence. The plaintiff offered to prove that Alexander was the defendants' agent, that the deed was delivered to him as such, and that he said at the time that the plaintiff would soon be paid in full. If it had been shown that Alexander was

the general agent or representative of the defendants, or that he had been employed to buy the land, such evidence might have been admissible, although there would still be room for doubt. But, employing an agent to examine the title to a tract of land, and if it proves to be good, accept a deed and pay the price, does not authorize him to contract for his principal, or vary the terms that have been already fixed by the latter. As well might the hand assume the function of the head. It does not vary the case that Alexander was directed to examine the title before closing the transaction. A man who is about to buy a farm may employ an agriculturalist to ascertain and report on the quality of the soil, a lawyer to look into the title, and finally a conveyancer to draw the deed, without empowering any or all of them to say how much he is to give or when. This is peculiarly true where the principals agree on the terms of the sale, and an agent is subsequently retained to carry the contract into execution. Rule discharged.

M. Hampton Todd and R. N. Wilson, Esqs., for plaintiff.

E. S. Miller, Esq., for defendants.

[Leg. Int., Vol. 29, p. 44.]

STONE vs. JUSTICE.

An action cannot be sustained by a creditor against one who promises with the original debtor, in consideration of transfer of property, to pay his debts, where the creditor has not given up his original demand, and agreed to look solely to the promisor.

A rule for a new trial and motion for judgment on points reserved. Opinion delivered *January 27, 1872*, by

HARE, P. J.—Wilson conveyed his property to Justice to whom he was largely indebted, and Justice, in consideration thereof, promised to pay Wilson's debts, and among others, one to the plaintiff Stone. The plaintiff was not a party to this arrangement, but on being informed of it by Wilson brought suit against Justice. The defendant contended at the trial, first, that the alleged contract was within the statute of frauds; and next, that the plaintiff was a stranger to the contract. Both points were reserved and the evidence submitted to the jury, who found a verdict for the plaintiff. On the first point the case cannot be distinguished from *Shoemaker vs. King*, 4 Wright, 107. Like that, it is a promise to pay the debt of another in consideration of a transfer of his assets. The court said, that although such a contract might be valid between the parties it could not be enforced by the creditors unless they gave up their original demands and agreed to look solely to the promisor. Without this an express promise to them would be invalid, and therefore none could be implied. So long as the old debt remained, a promise of payment by a third person must necessarily be collateral and within the statute.

Sitting here, we are not to weigh this authority against decisions in the other States, which seem to indicate a different rule. It is, however, said that a transfer of the assets of a debtor in trust for the payment of his debts, creates an equitable obligation which need not be reduced to writing, and may be enforced in Pennsylvania through an action for money had and received. This may be true as a general proposition, but it does not apply in a case where the evidence discloses a contract

and not a trust. The difference between a trust for creditors, and a promise to pay the debts of another in consideration of value received from him, can be more easily illustrated than defined.

The transfer of property in trust does not confer a beneficial interest on the assignee. He is a custodian of the fund, with a power of sale and the duty of applying the proceeds in accordance with the directions of the assignor. But this is all. His obligation is merely to account for what he receives. He does not undertake to pay the debts, but that the assets shall be appropriated to that object. If they are destroyed by fire or any other inevitable cause, his liability is at an end.

On the other hand, a conveyance in consideration of a promise to pay the debts of the grantor, differs from an ordinary sale only in the mode prescribed for the payment of the price. The grantee acquires an absolute right of property, and is not bound to render an account to the creditors who have no legal or equitable interest in the fund. It follows that he cannot allege the insufficiency of the assets as a reason why he should not fulfil his promise. Like other purchasers he must abide by the contract, notwithstanding the inadequacy of the consideration.

Tried by these tests the case in hand is a contract and not a trust. The defendant Justice manifestly acquired an absolute right in the assets to do with them as he would. It is equally clear that if the alleged promise had any existence, it was to pay the debts of the assignor without regard to their amount. The creditors were not to look to the fund for payment, but to him. There was a personal obligation on his part, or there was none. The plaintiff's case is therefore clearly *ex contractu*, and within the meaning of the statute as defined in *Shoemaker vs. King*.

The remaining question, whether the plaintiff can recover in the absence of privity of contract, is governed by *Campbell vs. Lacock*, 4 Wright, 448, which establishes that an agreement with a debtor to pay his debts cannot be enforced by the creditors unless they participate in the contract, or the promisor subsequently recognizes their right. If A is indebted to B, or receives value from him, and in consideration thereof promises to pay a debt from B to C, the agreement does not confer a legal right on C. It is not necessary that he should relinquish his demand against B unless the circumstances are such as to bring the case within the statute of frauds, but he must claim directly from A, and not merely through the contract between A and B. It is not pretended in this instance that the defendant entered into a direct engagement with the plaintiff, or that he at any time admitted the existence of an obligation to him. Judgment is consequently entered in his favor on both the points reserved.

Amos Briggs, Esq., for plaintiff.

Albert S. Letchworth, Esq., for defendant.

[Leg. Int., Vol. 29, p. 300.]

MACHETTE vs. MAGEE.

It is not necessary to bring in as parties the personal representatives of a deceased co-defendant. The death may be suggested of record, and the action continue against the survivor.

A rule for a new trial. Opinion delivered *September 16, 1872*, by HARE, P. J.—This was an action of assumpsit against John H. Magee and George Magee, Jr.

John H. Magee died after the service of the writ, and his death was suggested on the record. A jury was subsequently called to try the issue as against George Magee. It is now alleged that the executors of John H. Magee should have been brought into court by a *scire facias*. This seems to us a misconception of the rule. Such a course might have been adopted, but it was not obligatory. The statute of 8 and 9 Wm. 3d, ch. 12, which is in force in Pennsylvania, provides, "that if there be two or more plaintiffs and defendants, and one or more of them dies, the writ or action shall not thereby be abated, but such death being suggested upon the record, the suit shall proceed on behalf of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants." The act of assembly authorizing the plaintiff to make the personal representatives of a deceased defendant parties to the record did not repeal this statute. It was designed to give a further remedy and not to impose an obligation. This is the more obvious, because the executor or administrators of a deceased co-contractor cannot be joined except on equitable grounds, to prevent a failure of justice through the insolvency of the survivor.

Rule discharged.

Isaac Gerhart, Esq., for plaintiff.

Thomas J. Diehl, Esq., for defendant.

[Leg. Int., Vol. 29, p. 306.]

THE COMMERCIAL MANUFACTURING COMPANY vs. CONRAD.

Where there has been a judgment for defendant in an attachment execution, it necessarily discharges the garnishee.

Rule for judgment on special plea. Opinion delivered *September 21, 1872*, by

HARE, P. J.—The history of this case is sufficiently curious to merit attention. It is an attachment sur judgment, issued to June term, 1864, against Osborn Conrad, the defendant in the judgment, and the Bank of Penn Township, as garnishee. The defendant Conrad appeared and pleaded "payment," to which he subsequently added a special plea, that the plaintiffs agreed to accept ten per cent. in satisfaction of the judgment, and that he tendered the amount to their treasurer, who refused to take it. The cause came for trial on the 24th of January, 1866, before Judge Stroud. No evidence was adduced under the plea of payment, there being no pretence that the defendant had given or the plaintiffs received the sum due, and the only question was, whether the defendant was entitled to a verdict on the second plea. This was clearly insufficient; first, in setting up an accord without satisfaction; and next, in

assuming that a judgment could be satisfied by a partial payment. The jury were instructed to find for the defendant if they were satisfied that his allegations were sustained by the evidence. The verdict was in his favor, and the plaintiffs moved for a new trial, and for judgment *non obstante veredicto*. The former motion was refused, and a rule granted under the latter which went on the argument list in the ordinary course of business. The court subsequently made the rule absolute; Judge Stroud and myself concurring with the president judge, as to the invalidity of the plea, and that it would be useless to have another trial, because the defendant's case was set forth of record, and he had confessedly nothing more to adduce. It need hardly be said that the existence of the plea of payment was not adverted to by counsel or known to the court. This will not appear surprising to those who are aware that payment is generally, if not universally, pleaded in short in debt, covenant and assumpsit, with the view of giving a set-off or equitable defence in evidence under a notice to that effect, for which the defendant sometimes, as in the present instance, substitutes a special plea. We can therefore readily understand why the plaintiffs' counsel should, equally with the defendant's, have considered both pleas as being in fact one, and that the record disclosed but a single defence. This appeared from the pleas themselves, because it would have been absurd and frivolous to allege a tender of ten per cent. if the whole debt had been paid in the ordinary acceptance of the term. Technically, however, each plea must be judged by its own merits without collateral aid or explanation.

It results from what has been said, that while the judgment *non obstante veredicto* was the only one that could have been rendered consistently with the case as presented by the counsel on either side, it was clearly erroneous in view of the record, and would have been set aside instantly if the attention of the court had been called to the first plea. Instead of adopting this course the defendant's counsel took a writ of error. In saying this I think it a duty to acquit Mr. Simpson of anything approaching a *suppressio veri*. No one who is acquainted with him can suppose that he kept back the plea of payment in the court below, with the view of taking advantage of it in the court above. He undoubtedly regarded the allegation that the debt was paid as the nullity which he knew it to be in fact. His object in issuing the writ of error was to obtain the judgment of the tribunal of last resort on the validity of the second plea, which set forth the facts in a compendious form, and afforded a ready means of bringing the case to the test of an issue of law. If the transaction which it detailed satisfied the judgment the defendant was entitled to go *sine die*; if it did not the decision of the court below would be affirmed. But it sometimes happens that a straightforward course has the effect of a successful ruse. When the case came before the Supreme Court, that tribunal saw that it could only be decided in one way. The jury had found that the debt was paid; the court below had refused a new trial; how then could the plaintiff be entitled to issue an attachment execution? Strong, J., said, "the record exhibits a judgment given against the defendant, notwithstanding all the issues were determined in his favor, and this without any question reserved. This was, of course, irregular." The judgment was reversed

on these grounds without touching the question presented by the second plea, which was the only one considered by the court below, or that the parties had designed to raise. But as the case obviously was not in a position for a final judgment, the record was remitted with "directions to proceed."

From the accurate learning of the judge who delivered the opinion, we may infer that his remark, that "judgment had been given against the defendant, although all the issues were determined in his favor," was directed to the plea of payment. He was of course aware, that when a plea confesses the cause of action without sufficiently avoiding it, judgment may be entered for the plaintiff, notwithstanding a verdict for the defendant, and although no question is reserved at the trial. *West vs. Blakeway*, 2 M. & G. 729. A judgment on a point reserved and a judgment *non obstante veredicto* are so different that the failure to distinguish them tends to a confusion of ideas. The one is a branch of the doctrine of pleading as it has been established from the earliest times; the other, a power which the court can only exercise through the consent of counsel, or by virtue of an authority conferred by statute. It is therefore entirely regular to enter judgment against a defendant who has obtained a verdict on an invalid plea of satisfaction. But a judgment against a defendant who pleads and proves a payment in full is manifestly erroneous, although I do not perceive why it should be termed irregular.

The cause now entered on what may be called its second stage. To render what follows intelligible, I must revert to an event which occurred before the writ of error was brought into the office. It is another proof that a success may be obtained through an oversight, which would have been denied to the utmost skill. Subsequently to the refusal of a new trial, and while the rule for judgment *non obstante veredicto* was still pending, the defendant's counsel paid the jury fee, and judgment was thereupon entered for his client in the office. This step was, so far as I am able to discern, not merely irregular, but null. Originally, judgment was pronounced in all cases by the judges in open court. Convenience subsequently established that when the plaintiff's or defendant's right to judgment appeared of record, he might sign judgment in the office without applying to the court. Stephens on Pleading, 132. It follows, that when the record negatives the existence of such a right, it cannot be a valid ground for judgment. In England judgment is signed by filing a minute drawn in the appropriate form, with the sanction of the clerk or master. With us the prothonotary enters "judgment" on the docket at the instance of the attorney. It is obvious that an attorney, merely as such, cannot decide the case in favor of his client. He is legally one with the party; and it is an established maxim, that a man shall not be judge in his own cause. The prothonotary is simply a clerk charged with the important duty of keeping the books, but having no general authority to adjudicate. It is therefore by virtue of power impliedly conferred by the court, that an attorney who obtains a verdict for his client can direct judgment for the latter on the *quarto die post*. If, however, the opposite party moves for a new trial with the express or tacit consent of the judge, this power is impliedly revoked. A judgment entered under such circumstances is a nullity and may be treated as such by the opposite party or the court. The principle is the same, where the

court, while refusing a new trial, grants a rule to show cause why the judgment should not be arrested or a judgment entered *non obstante veredicto*. Such a rule brings the whole record before the judges, and renders it incumbent on them to determine which party has the right in view of what it contains. It will not be contended that judgment can be entered in the office with a view to forestall the result of their deliberations. Such a course would be a manifest breach of official duty on the part both of the prothonotary and the attorney. It is therefore, necessarily invalid, as it regards the client, who ought not to profit by the error of his agent. Every reasonable intendment should no doubt be made in favor of official acts and entries. When, however, the defect is gross and appears of record, no supposition will be indulged contrary to the truth. An office judgment entered by one party pending a rule for judgment obtained by the other, is within this principle. The rule is notice to all the world that the court has taken the matter into its own hands and intends to pronounce a decision, which will be final if not reversed. Such a rule may be made absolute without striking off a judgment which has been placed on the record during the interval, without the knowledge or sanction of the court, because that need not be expressed which is necessarily implied.

This view seems to have been taken in the first instance by the court above, in enjoining the District Court to "proceed," which obviously implied that the office judgment of March 10, 1866, was not final or conclusive. If the *procedendo* was not an unmeaning form, it was an authority to retry the cause. The better course would probably have been for the plaintiffs' counsel to bring the matter formally before us by renewing the motion for a new trial.

The right to set aside a verdict does not necessarily end with the term. But it would seem that a court which has once decided that a verdict shall stand, by refusing a new trial, cannot set the matter at large of its own motion at a subsequent period. The power of a court of error to order a *venire de novo* is, however, unquestionable, and as it may do this directly, so it may attain the same end indirectly through an order to the court below. The *procedendo* was, as we have seen, such a mandate, and when the plaintiffs put the cause again on the trial list, in pursuance of the authority which it conferred, it became the duty of the defendant to maintain the issue on his part. Instead of adopting this course, he suffered the verdict to go by default, and filed a special plea in the nature of a plea *puis darreign continuance*, alleging that he had on the 10th of March, 1866, obtained a final judgment, which stood unappealed from and unreversed, as he was ready to verify by the record. In other words, he rested his case on the single point, that what had already occurred precluded further inquiry. As such a defence seemed to be directly at variance with the injunction of the court above, it was disregarded, and judgment given on the verdict. The plaintiffs' counsel, however, agreed, at our suggestion, to waive the advantage he had gained through the refusal of the defendant to appear and give evidence at the trial, by withdrawing his replication to the plea of accord and satisfaction, and filing a demurrer. This was done with the view of enabling the defendant to present the case to a court of error in its true aspect, and as it would have appeared originally but for the

inadvertence of counsel. There was, consequently, some reason for hoping that the merits would be reached and finally determined.

When, however, the case was again argued before the Supreme Court, that tribunal took a view which had not been anticipated. Mr. J. Agnew said: "The record shows two different and inconsistent verdicts and judgments in the same cause, one for the defendant, and one for the plaintiff. It is not easy to see how the District Court could have permitted the case to be tried the second time where the record showed a verdict and judgment in favor of the defendant, which had not been reversed or set aside, especially as the judgment was set up as a bar to the plaintiffs' right to proceed to a second trial. It is manifest that all the proceedings which have taken place in the court below since the former writ of error have been grossly irregular and erroneous."

We have no desire to question the reasons assigned for a decision which it is our duty to respect, but I may be permitted to observe, that two judgments in the same cause, one for the plaintiff, and one for the defendant, are not an unusual spectacle. It constantly happens that a judgment is opened and the case sent to a jury. If the plaintiff obtains the verdict, his judgment stands; if the defendant is successful, a judgment is entered in his favor, and both judgments remain of record. It is not customary to make a formal order that the judgment for the plaintiff shall be set aside, because this is implied in giving judgment for the defendant. In like manner a judgment entered on a verdict pending a rule for a new trial, for judgment *non obstante verdicto*, or in arrest of judgment, need not be stricken off before making the rule absolute. Such an adjudication overrides any step that may have been taken without the sanction of the court by the prothonotary, his clerks, or the attorney on either side. So where a court, which has entered judgment for the defendant on a demurrer to the replication, gives the plaintiff leave to amend by pleading issuably, a subsequent verdict and judgment in his favor are not regarded as irregular. The reason is, because the authority to amend implies that the judgment for the defendant shall not preclude the plaintiff from doing what is requisite to take advantage of the authority.

Such a case goes beyond the requirements of the present, because a judgment for the defendant on a demurrer is *prima facie* final, which cannot be said when a judgment is entered in the office, while the record shows that the court held the matter under advisement. It should be remembered that what is called the record in Pennsylvania is not technically a record, but rather the materials from which the record may be made up. In determining whether the proceedings of a court should be reversed for want of form, the brief entries of the counsel or judges should consequently be viewed as they would appear if duly extended, setting forth all which, though not expressed, is manifestly to be understood.

We may consequently infer that when the court above sends a cause down with directions to proceed, and a new trial takes place in obedience to the mandate, there is no irregularity in a verdict and judgment for the party who failed in the first instance, because a result which might otherwise be anomalous is explained and justified by the "*procedendo*." Conceding that the judgment of March 10, 1866, had all the effect of

an adjudication, the Supreme Court might still authorize this court to disregard it, and go on with the cause. Why the trial which took place in pursuance of their order, and the judgment rendered for the successful party, should be regarded as grossly irregular, is a question which may be considered by those who are free to give the answer. The plaintiffs' counsel thought that the reason appeared in the opinion delivered by Mr. J. Agnew. It was his failure to have the office judgment set aside, and a new trial granted before sending the case to another jury. This omission seemed to us merely technical and formal. Still, if the court above were of a different opinion, justice should not be hindered by a defect of form. A rule to set aside the judgment was accordingly granted, and made absolute. We took this course on grounds that have been already stated. The judgment seemed to us a nullity, as having been entered without our sanction, and while it appeared of record that the case was before us for consideration. Moreover, the "*procedendo*" could only be understood as an injunction to go on notwithstanding the judgment, if such a course was in our opinion requisite for the ends of justice, and consequently to set the judgment aside, if there was no other way. It now appears that our order has been reversed by the Supreme Court, and the judgment reinstated, although I have not had the advantage of seeing the opinion of the court above.

It might have been supposed that this long protracted controversy would have ended here. If the defendant's offer of ten per cent. was not a satisfaction, still the plaintiffs were no longer in a position to recover anything. They were of this mind, and remained quiescent. But the defendant is now before us with a motion for judgment, on the special plea of January 3, 1870, and to dissolve the attachment. It has been already stated that this plea is *sui generis*. It resembles the whole record in being unlike anything else. A recovery in a former cause must be pleaded in order to bring it within the cognizance of the court, but no one ever heard of pleading what the record shows. If the plaintiff is so ill advised as to set a case down for trial after judgment has been duly entered for defendant, the defendant ought not to raise a new issue by filing a plea, but ask the court to strike the case from the list, or let the plaintiff take his own way, secure that it will end in nothing. If, on the contrary, the judgment is invalid, or the court has been authorized to proceed notwithstanding the judgment, it is useless to allege that which appears already, and which must be disregarded. The plea is, therefore, simply an excrescence. It asks us to adjudge that we have already given judgment. If this is true, it were useless to go over the same ground; if it is not, we should be careful not to falsify the record. The rule to dissolve the attachment is as superfluous, because if judgment was given for the defendant, it necessarily discharged the garnishee.

It is not a subject for congratulation, that the constant efforts of counsel, of this court, and of the court above, to bring the case to a legal termination, should have been so little fortunate in their results. Seldom has the law been more inextricably entangled in a net of form. The cause is not far to seek. If the Supreme Court had not been hindered by a technicality, it could have seen what was abundantly

clear to the natural eye, that the defendant would not have pleaded a tender of ten per cent. if he had paid the debt in full. Nor would it, after directing this court to proceed with the cause, have regarded the new trial, which was the only way in which the injunction could be made effectual, as irregular because the former verdict was not formally set aside. No great harm has perhaps been done as between these parties. If the plaintiff agreed to accept a partial payment as in full, he was morally bound. But I regret the lesson which this record teaches, that a judgment entered at the instance of an attorney, while the case is held under advisement by the court, may preclude the opposite party, although vigilant and unceasing in the endeavor to prosecute the cause.

Rules discharged.

Moses Dropsie, Esq., for plaintiff.

J. Alex. Simpson and A. V. Parsons, Esqs., for defendant.

[Leg. Int., Vol. 29, p. 381.]

MAWSON vs. GOLDSTONE, Defendant, and the **ANTHRACITE INSURANCE COMPANY**, Garnishees.

A general judgment against a garnishee for want of an appearance stricken off as informal.

Per Curiam.

Rule to strike off judgment and set aside execution.

This was an attachment execution, returnable the 1st Monday of June, 1872. The sheriff returned "made known to garnishees and *nihil habet* as to defendant." On November 7, 1872, plaintiff entered judgment against the garnishees for want of an appearance, and assessed damages to the amount of defendants' indebtedness to plaintiff.

Appearance was entered for garnishees two days afterwards, and this rule was taken. On the 16th inst. the rule was made absolute, the court holding that the general judgment entered against a garnishee for want of an appearance, and an execution *de bonis propriis* issued thereon, should be set aside on account of informality in entering the judgment and issuing the execution—the court expressing no opinion as to the practice of assessing the damages under such circumstances. (See *Layman vs. Beam*, 6 Wharton, 185, and 1 Tr. & H. Pr. 959.)

Edward H. Weil, Esq., for plaintiff.

Morton P. Henry, Esq., for garnishees.

[Leg. Int., Vol. 29, p. 4.]

SIMPSON vs. KENT.

Where it appeared that a witness of the party who obtained the verdict conversed with one of the jurors during the progress of the trial relative to matters connected with the case, and that the same juror after the jury had retired made statements to his fellows of facts relating to the controversy which were not in evidence on the trial, a new trial was granted.

Rule for a new trial. Opinion delivered December 30, 1871, by

THAYER, J.—It appears from the depositions that during the progress of the trial one of the defendant's witnesses had several conversations with one of the jurors relative to matters connected with the case on trial, and that the same juror stated to his fellows (after the jury had

retired), as facts within his personal knowledge, some matters relative to the controversy which were not in evidence on the trial. This may have been very innocently done on the part both of the witness and the juror. On the other hand it may not have been so done. It is enough that the verdict was rendered for the side advocated both by the witness and the juror. In such a case we will not stop to weigh motives or to balance probabilities. Every suitor who comes into this court has a right to a trial by an impartial and unprejudiced jury. Moreover, his case is to be tried upon evidence submitted in open court, and not upon the *ex parte* statements of a juror made where contradiction and explanation are alike impossible. We are by no means sure that the plaintiff has had such a trial as she is entitled to. Whatever chances and accidents may enter into the determination of causes by juries, it is to be desired that improper outside influences, no matter from what motives they may proceed, shall not be enumerated among them, and so far as it is in our power to prevent this it is our intention to do it. No man who comes here for justice shall be able to say when he goes out of this court that his cause has not been fairly tried, or that it has been determined by a prejudiced or partial tribunal, or decided upon evidence which he has not heard, or by witnesses whom he has not confronted.

Rule absolute.

H. J. McCarty, Esq., for plaintiff.

Hon. F. C. Brewster, for defendant.

[*Leg. Int.*, Vol. 29, p. 4.]

BUNTING *et al.* vs. DESSAU.

1. Where there has been neither a tortious taking nor a tortious withholding of the plaintiffs' goods he cannot maintain trover.
2. The plaintiff sold and delivered goods to the defendant, the delivery to be considered conditional until they were paid for within ten days. The plaintiffs not having demanded the goods at the expiration of the credit, and having delayed to make any demand until nearly a month afterwards, and the defendant having sold the goods in the meantime: *Held*, that the plaintiffs could not maintain trover against the defendant.

Rule for a new trial. Opinion delivered *December 30, 1871*, by

THAYER, J.—The plaintiffs brought an action of trover for certain goods which they had sold to the defendant. At the time of the delivery the defendant had signed the following paper:

Messrs. BUNTING, DURBOROW & Co.

I hereby promise to pay the bill purchased of you on the 5th inst., amounting to \$279.70, within ten days of this date, and the delivery of the goods is to be considered conditional until the above terms are complied with.

ISAAC DESSAU.

Dated *December 6, 1870*.

On the 12th of January, 1871, the plaintiffs, not having been paid, demanded the goods of the defendant, who replied that he had them not. In point of fact he had sold them between the 6th of December and the 12th of January, in the regular way of his business, which was that of a retail vendor of such articles. This was the conversion complained of. It may well admit of doubt whether, under the circumstances disclosed

in this transaction, it was not in the contemplation of both parties that the defendant should be at liberty to sell the goods at any time if he had the opportunity to do so, and whether the terms of such an agreement made by such parties and under such circumstances would not be satisfied by leaving the plaintiffs to reclaim such of the goods as might not be sold at the expiration of the credit. It is difficult to see what benefit the defendant could otherwise derive from the possession. But it is unnecessary to decide this. After the expiration of the credit it was plainly the duty of the plaintiffs to have demanded the goods immediately if they intended to assert their right to the ownership. Having neglected to do so, and having delayed for nearly a month in making their demand, they cannot hold the defendant as a *tort feasor* for having sold them. For it is a well-established rule that if the defendant in an action of trover has no possession, actual or constructive, at the time of demand and refusal, and there has previously been no tortious taking or withholding, he is not liable. Where a person comes lawfully into possession of the property of another, and parts with it previous to a demand, the remedy is not trover but assumpsit. Here the possession was lawfully acquired, and the neglect of the plaintiffs to demand the goods at the expiration of the credit relieved the defendant from any obligation to continue to hold them. In the absence of any demand for them he had a right to regard the plaintiffs as having waived the condition which they had imposed on the transfer of the ownership, and he was at liberty to sell them. There was, at the time of the demand made, no tortious withholding. The plaintiffs, therefore, cannot maintain this action.

Rule absolute.

Thomas J. Diehl, Esq., for plaintiffs.

R. P. White and Geo. H. Earle, Esqs., for defendant.

[*Leg. Int.*, Vol. 29, p. 4.]

PAUL vs. JOHNSON.

The plaintiff having a judgment against Richard Johnson issued an attachment execution, which was served upon the garnishees. The garnishees were indebted to the defendant, whose real name, however, was Richard H. Johnson. After service of the attachment the garnishees paid the money to the defendant. *Held*, that they were not relieved from responsibility to the plaintiff by reason of the alleged misnomer of the garnishee in the writ.

Rule for a new trial. Opinion delivered *December 30, 1871*, by

THAYER, J.—The plaintiff having obtained a judgment against Richard Johnson, issued an attachment execution thereon, wherein Whitney & Sons were made garnishees. The attachment execution was duly served upon the garnishees by the sheriff, December 12, 1870. At the time of the service of the attachment execution the garnishees were indebted to Richard H. Johnson in the sum of \$726.21. The garnishees paid this debt subsequent to the service of the attachment execution upon them, viz., on the 14th of January, 1871. The payment was made in a check on the Philadelphia Bank, drawn by the firm to the order of their cashier, John H. Redfield, and by him indorsed to the order of Richard Johnson, who also indorsed it Richard Johnson. From the evidence on the trial there was no reason to doubt that the defendant described in the attachment execution as Richard Johnson

was in point of fact the same individual to whom the garnishees were indebted, and whom they paid as Richard Johnsen. The garnishees contended that they were, by the misnomer of the defendant, relieved from responsibility for having paid the debt after the service of the attachment. The judge before whom the cause was tried instructed the jury that if the person to whom the garnishees were indebted was the same person against whom the plaintiff had obtained judgment, and who was the defendant in the attachment execution, the fact that the defendant was described in the attachment execution as Richard Johnson, when in truth his name was Richard H. Johnsen, would not discharge the garnishees from responsibility for having paid the defendant after service of the attachment execution upon them.

At common law misnomers in non-bailable process could only be taken advantage of by pleas in abatement, which were always disfavored, and were finally abolished in England by the 3 and 4 Wm. IV., c. 42, section 11. Pleas in abatement for misnomer have not been abolished in Pennsylvania, but the large powers of amendment at any stage of the proceedings have rendered such pleas practically useless for the only purpose for which they were devised—delay. The defence in the present case amounts to an attempt to plead a misnomer in bar, which is a thing unknown to our system of jurisprudence. Besides, the alleged misnomer was altogether immaterial, and would be bad even if pleaded in abatement. Upon the principle of *idem sonans*, which holds that slight differences in spelling amount to nothing as long as the identity of sound is preserved, Johnson is the same name as Johnsen. Even if there be some difference of sound, that is of no importance if the substantial identity of the name be preserved, according to the rule laid down by Judge Washington in *Gordon vs. Holliday*, 1 W. C. C. R. 289. Where two names have the same original derivation, or where one is an abbreviation or corruption of the other, but both are taken promiscuously and according to common use to be the same, though differing in sound, the use of one for the other is not a material misnomer. This rule was recognized by the Supreme Court of this State in *Jones' Estate*, 3 Casey, 336, where it was applied even to settle a question of priority of judgment liens.

As to the omission of the initial of the defendant's middle name in the process, that is an omission which from the very infancy of the English law has always been regarded as a matter of no moment whatever. No man, according to *Rex vs. Newman*, 1 Lord Raym. 562, can have more than one Christian name, and this has been followed by all courts wherein the English law has been administered. It follows as a corollary from this, that an initial letter interposed betwixt the Christian and surname is no part of either, and it was accordingly so expressly ruled in *Bratton vs. Seymour*, 4 Watts, 329.

It is true, that docketing a judgment in an erroneous Christian name, or even omitting an initial letter from such judgment, may, as to a subsequent purchaser or judgment creditor without notice, destroy or postpone the lien of such judgment. *Wood vs. Reynolds*, 7 W. & S. 408; *Ridgway's Appeal*, 3 H. 177. But that depends upon a principle which has no application to misnomers in process, of which a party to the process is claiming the advantage. A judgment against a defendant, in

which his Christian name is erroneously spelled, or which omits a middle name, or the initial of it, is a perfectly good judgment as to him. A subsequent purchaser was relieved in *Wood vs. Reynolds*, because his judgment search showed no such judgment as was sought to be enforced against him. The judgment had been entered against the defendant in a wrong name, and so did not appear upon the search at all. He was absolutely without notice; and it is a settled principle that a subsequent purchaser or judgment creditor is not bound to look beyond the judgment docket. *Hume's Appeal*, 1 Barr, 405; *Morris' Appeal*, 1 Barr, 25; *Bean vs. Patterson*, 3 W. & S. 233; *Mehaffy's Appeal*, Ib. 200.

But a garnishee in an attachment execution is neither a purchaser nor a judgment creditor. Nor does he stand in a relation which is analogous to theirs. His position is totally different from theirs. This difference is very strikingly illustrated by a comparison of two decisions of the Supreme Court—*Ridgway's Appeal*, 3 Har. 177, and *Rushton vs. Rowe*, 14 Smith, 63. In the former a judgment entered against a firm without mentioning the Christian names of the partners, was held to be of no validity against subsequent purchasers or judgment creditors. In the latter a similar mistake in a foreign attachment was held not to affect or impair the validity of the attachment. The principle of *Rushton vs. Rowe* is, that a misnomer of the defendant in a foreign attachment cannot be set up as a defence by the garnishee. If it is applicable to a foreign attachment, it is applicable to an attachment execution.

A garnishee is a party. He is a party bound to unusual diligence and caution. He can be compelled to pay neither the plaintiff nor defendant except upon full investigation and after the judgment of the court. He is fully protected himself, and is bound to protect the other parties until a legal result is regularly reached. It is very easy for him to do so, for he has nothing to do but to stand still and guard the treasure for which the rival claimants are contending. If, from carelessness, or neglect to employ counsel, or any other cause, he pays the wrong party before the contest is judicially determined, he cannot justly complain if he is compelled to pay the right party when he has been ascertained by the judgment of the court.

We are of opinion that the instruction given to the jury in this case was a proper instruction. The writ served upon the garnishees was to them notice of the highest character, not to pay the debt which they subsequently paid, notwithstanding the attachment. The slightest inquiry would have revealed the fact that the man whom they owed and the defendant in the attachment was the same individual, notwithstanding his peculiarity in spelling Johnson with an *e* instead of an *o*.

The difference does not appear to us to be either great enough or strong enough for us to build upon it a decision depriving the plaintiff of the fruits of his execution.

Rule discharged.

Thomas J. Diehl, Esq., for plaintiff.

Wm. S. Price, Esq., for defendant.

[Leg. Int., Vol. 29, p. 36.]

AMOS vs. CLARE.

A lease provided that the lessee should repair the premises at his own expense, and make alterations to fit it for a HOTEL: *Held*, that this was a sufficient WRITTEN CONSENT under the act of August 1, 1868, to authorize filing of lien for work done for lessee.

Sci. fa. sur mechanic's claim. Opinion delivered January 27, 1872, by LYND, J.—Clare leased a dwelling-house to Crawford. In the lease it was provided, "that the lessee, at his own charges, should well and sufficiently repair the demised premises and every part thereof, with all manner of needful repairs as often as occasion shall require, and that he should make such alterations and repairs to the above-described and demised premises as shall be necessary for the keeping of a hotel, under the terms and conditions set forth in the above lease."

The lessee employed the plaintiff to do the carpenter work required for the *alteration of the building into a hotel*.

At the trial the following was reserved:

"Whether the lease offered in evidence contains such a written consent of the owner as renders the property liable to the lien under the act of assembly of August 1, 1868."

The material portion of the act of 1868 (P. L. 1168) referred to in this point is:

"Nothing in this act shall render property liable to liens for repairs, alterations or additions, where the same has been done by any lessee or tenant, *without the written consent of the owner* or owners or their authorized agent or agents, a copy of which written consent must be filed with the claim or statement."

We think that the primary object of the act was to provide the same protection to mechanics who furnished labor or materials for the *repair or alteration* of buildings, as prior acts had provided for those who engaged in the erection or construction thereof; and that the object of the proviso above quoted was two-fold: First, to exclude the conclusion that a tenant could, of his own motion, render the demised premises liable for alterations and repairs; and secondly, to supply a rule of evidence of the lessor's consent, to wit, that it should be in *writing*.

Wherever, therefore, it sufficiently appears that the alterations were not made upon the mere motion of the lessee, but that the landlord knew of and assented to them, and the evidence of this is in writing, the statute is satisfied, and the mechanic employed by the lessee is entitled to his right of lien.

The provision of the lease in question not merely shows the consent of, but a requisition by, the lessor that the lessee shall make such alterations in the premises as shall adapt them for the purposes of a hotel.

It surely cannot be contended that the alterations made in pursuance of that requisition were made without the lessor's knowledge and consent.

The case seems almost too clear for argument; and all that need be said in fortification of the conclusion just indicated will appeal in our review of the positions submitted by the defendant (lessor).

First, that the statute requires a special consent, *dehors* the lease, a copy of which shall be filed with the claim.

This position is not supported by the letter of the statute. It provides for a "written consent" in the simplest terms, without any words of qualification or limitation. It does not provide that the consent shall be given after the execution of the lease, or before the commencement of the repairs; indeed, a consent before the execution of the lease or after the completion of the work would be entirely compatible with its language. It certainly does not prohibit the lessor from incorporating his consent in the lease itself.

Nor can the spirit of the statute be appealed to for the support of the defendant's position. The sole purpose of requiring the consent of the landlord was to protect him from claims that might be incurred by his tenant, without his knowledge and approval. The knowledge and approval indicated by oral consent are obviously identical with the knowledge and approval indicated by written consent. The object, then, of requiring the consent to be in writing was to guard the landlord against those who might falsely swear that the repairs and alterations had been concurred in by him. The spirit of the legislation in question, then, would be satisfied by any mode of proof of consent that excluded the possibility of perjury, *e. g.*, the landlord's own admission upon the witness stand that he had orally consented.

A fortiori, the spirit of the statute would require the allowance of proof of written consent by means of a provision in the written lease.

The defendant has fallen into this error from a neglect to distinguish the two requirements of the proviso. The first is the written consent of the lessor to the doing of the work—without this there could be no right of lien; the second is, that the copy of the consent should be filed with the lien—this affects the validity of the act of filing the claim. The mechanic may have his right to a lien, though he have no copy of the consent; but he forfeits his right, unless he secures such copy by the time of filing his claim.

The consent that gives the right to the lien need not be separate from the lease, though the copy, which must be filed with the claim, whether of a consent in or out of the lease, must certainly be separated from the original writing.

Secondly, the defendant further argues that the direction in the lease, as to the repairs and alterations, is not the written consent required by the statute, because it is stipulated that the lessee shall make the same "at his own charges."

This is the express or implied condition of every general building contract, and yet no owner ever claimed for his estate immunity from lien, because, as between him and the contractor, the duty to pay for the work and materials furnished was upon the latter.

But the point has been frequently and expressly decided against the defendant in the case of improvement leases.

Woodward vs. Leiby et al., 12 C. 437; *Leiby vs. Wilson*, 4 Wr. 463; *Hopper vs. Childs*, 7 Wr. 310.

The lessor may withhold, but he cannot qualify his consent—at least, not so as to deprive the mechanic of the privilege inuring to him under the statute.

Thirdly, the defendant further urges that the plaintiff is not entitled to maintain his claim, because it appears from the evidence that he did

not examine the lease, nor inform himself whether there was or was not a written consent by the landlord, before he did the work.

Whatever inferences this default may have supplied upon the question, whether the plaintiff had done the work upon the credit of the tenant and not of the building, it certainly does not deprive him of the benefit of the written consent, if, in point of fact, such consent had been given. It cannot be pretended that the act imposes upon him the duty of examining into that before he does the work—if he procures and files a copy at the time of filing the claim, it is sufficient.

Judgment for plaintiff on the point reserved.

Geo. W. Dedrick, Esq., for plaintiff.

William H. Martin and Daniel Dougherty, Esqs., for defendant.

[Leg. Int., Vol. 29, p. 68.]

BURNS vs. TONER.

Where a levy has been made under a *fi. fa.*, and the goods are claimed by a third person, and an issue is pending under the sheriff's interpleader act, an *alias fi. fa.* is erroneous, and will be set aside.

Rule to set aside an *alias fi. fa.* Opinion delivered February 17, 1872, by

THAYER, J.—Under a *fi. fa.* issued by the plaintiff the sheriff made a levy. The goods were claimed by a third person. The sheriff obtained the usual rule upon the claimant to maintain or relinquish his claim, which rule was made absolute, a bond given, and a feigned issue framed, which is still pending and undetermined. The plaintiff obtained a rule upon the sheriff to return the writ, which he accordingly did, making a special return setting forth the facts. Subsequently the plaintiff issued an *alias fi. fa.* upon the same judgment, instructing the sheriff to levy upon other goods of the defendant.

If the levy under the first *fi. fa.* is still in force, the second *fi. fa.* is clearly erroneous. The condition of the bond given by the claimant under the rule made by this court to carry into effect the provisions of the act of April 10, 1848, is that the goods levied on and claimed shall be forthcoming upon the determination of the issue, to answer the execution of the plaintiff, if the issue shall be determined in his favor. In such cases we have always regarded the levy as being in full force and operation, awaiting only the determination of the issue, and where the issue is determined adversely to the claimant, the uniform practice has been for the sheriff to proceed with the sale under the original *fi. fa.* and levy. Such a practice is totally inconsistent with the idea that the interpleader has put an end to the levy. The obligation assumed by the claimant, that the goods levied on shall be forthcoming to answer the execution, if the issue is determined against him, is also inconsistent with any such view. The only effect of the interpleader is to stay further proceedings by the sheriff until the *jus tertii* is determined. If that determination is in favor of the claimant (and in that event only), the levy is ended. If it is not in his favor the levy remains in full force, the sheriff resumes his possession and proceeds with the sale under the *fi. fa.* The object of the issue is to determine whether the levy shall be proceeded with or not. The effect of the rule which regulates the pro-

ceeding is not to determine the levy, and to substitute a mere pecuniary obligation in lieu of it. On the contrary, it requires that the identical goods levied on shall be forthcoming, if the claimant fails in the issue. The bond is required in order to secure this result. But if the goods are not delivered up by the claimant when the issue has been found against him, we entertain no doubt that the sheriff may nevertheless resume his possession and proceed to sell without any fresh levy. Nor do we think that it makes any difference that the sheriff has returned the *fi. fa.*, for the return itself shows that the levy is still in force, and the sheriff may doubtless sell under a *venditioni exponas*, if the issue shall be determined against the claimant. It is competent, perhaps, for the plaintiff to abandon the levy and all the proceedings under it, and afterwards to issue an *alias fi. fa.*, but he cannot pursue the defendant with a fresh writ while insisting upon his lien acquired by the levy already made, and while actually prosecuting the proceeding under it for the purpose of enforcing a sale. A plaintiff under such circumstances must make his election whether he will stand the hazard of his first levy, or by abandoning it place himself in a position to obtain satisfaction by a fresh execution.

Rule absolute.

[Leg. Int., Vol. 29, p. 388.]

SCOFIELD vs. HARBESON.

A defendant, whose lands have been extended and delivered to plaintiff, may, on filing an affidavit of facts showing a prima facie satisfaction of the debt, have a *scire factus ad computandum et rehabendum terram*.

Opinion delivered December 4, 1872, by

MITCHELL, J.—Real estate of defendant having been levied and extended under a *fi. fa.* on plaintiff's judgment, the plaintiff sued out a *liberari facias*, under which the sheriff delivered to him the possession of the house and lot at the valuation of \$1800 per annum, as found by the inquest. Sufficient time having elapsed to make the possession at this valuation more than equivalent to the sum of plaintiff's debt, interest and costs, the defendant now asks us to make absolute a rule on plaintiff to show cause why restitution of the premises should not be made, and the excess of rent, up to the time of restitution, paid to him by the plaintiff.

The first question that arises is as to our power to give defendant relief in the form in which it is now asked.

By the act of 16th of June, 1836, section 59 (P. L. 771), where lands in possession of a creditor under an extent are sold upon a subsequent execution, and by section 60, where the creditor is evicted by superior title, the extent is not satisfaction of the debt. The creditor is liable to account only for what he has actually or might have received, and is entitled to payment of the residue of his judgment. And in *McKelvy vs. De Wolfe*, 8 H. 374, it was held that the valuation of the inquest is not conclusive, but the creditor is accountable only for what he has actually received or might have received, using good faith, diligence and skill in the collection of rents and profits from the land.

It is sufficient to say, that in all these ways, and others which might be suggested, questions of fact are likely to be raised which cannot be

properly determined by the court upon a summary proceeding by rule. This is abundantly clear on principle, but were authority desired, the case of *Carlisle vs. Cunningham*, 1 Dall. 81, would seem to be ample. In that case, the defendant obtained a rule to show cause why the land should not be surrendered upon his bringing into court the *principal, interest and costs*, but the court was unwilling to go into the matter in a summary mode upon mere motion, and discharged the rule.

This rule must, therefore, be discharged, and here the matter properly before us is at an end. But as the subject is important, and there is no reported decision upon it, we have been requested by counsel to consider what remedy can be afforded to defendant in this court. This question is made difficult by the fact that the whole subject is unfamiliar. The process chosen by plaintiff in this case of taking possession of his debtor's land under a *liberari facias* has been practically obsolete in this county, if not in this State, for many years, having been superseded by the practice of leaving the defendant in possession and collecting the rent from him under the provisions of the act of October 13, 1840.

By the act of June 16, 1836, sections 52-57, provision was made for the debtor, whose lands had been extended, to require the plaintiff, by writ of *scire facias*, to settle an account of the rents, issues and profits, and show cause why the defendant should not again have his lands. But by the act of October 13, 1840, section 9, P. L. 1841, p. 4, these sections of the act of 1836 are repealed, and nothing substituted in their place. The purpose of the repeal is nowhere indicated. Had the intention been to take away the creditor's remedy by writ of *liberari facias* and substitute the new remedy given in the act, it would have been clear enough, but the creditor is expressly given his election between the two remedies, and it is therefore difficult to conjecture why the debtor's remedy for an account and re-delivery of the land was taken away.

Whatever the intention of the repeal, however, we are put by it to a careful inquiry into the nature of the writ provided by the act of 1836, in order to determine whether it rested on any other foundation than the repealed sections of that act.

The language of section 52 of the act of 1836 is, "It shall be lawful for the defendant, at the expiration of the time or term for which his real estate shall be delivered as aforesaid, to require the plaintiff, by a writ of *scire facias*, to settle an account of the rents, issues and profits of such real estate, during his possession as aforesaid, and show cause why the defendant should not have his land again."

And the other sections use the expression, "if it shall appear upon the accounting as aforesaid," etc., without any further description of the writ. Was this, therefore, a new writ devised for the special use of the act of 1836, and falling with its repeal, or was it a writ previously known, and available to courts of common law for all purposes to which it might be adapted?

By the act of 1705, 1 Sm. 57, lands were made assets for the payment of debts, but it was provided that, where execution should be levied on lands which should or might yield yearly rents or profits beyond all reprises sufficient within the space of seven years, to pay or satisfy the debt, such lands should be delivered to the plaintiff in the execution

"until the debt or damages be levied by a reasonable extent, in the same manner and method as lands are delivered upon writs of *elegits* in England."

The writ of *elegit* was given by the statute of Westminster Second, 13 Edw. I., c. 18, and under this statute it was early held that, where the creditor was satisfied of his debt by the efflux of time, the debtor might have a *scire facias ad rehabendum terram*, because it appeared by the record that the execution was satisfied: Rolle's Abr. Statute, c. I., 1. But if the debtor alleged that the debt had been satisfied by a casual profit, such as cutting and selling trees, etc., then he might have a *scire facias ad computandum*. 2 Rolle's Abr. Tit. Statute, K. 4, 13, 14. And a single *scire facias* might issue for both purposes. 2 Rolle's Abr. Tit. Statute, P. 2; 2 Institutes, 395-6; *Underhill vs. Deveraux*, 2 Saund. 71, and notes.

The statute of Westminster Second was never in force here, but under the act of 1705, it has been the opinion that the whole machinery of the English law relative to *elegits*, so far as it could be made applicable, was adopted as part of the law of Pennsylvania. The learned editor of Smith's Laws says modestly, whether the act "adopts all the consequences of the execution by *elegit* does not appear to be settled in any reported case known to the editor, nor does common experience justify him in expressing any opinion on this point," but he proceeds to describe in this connection the writ of *scire facias ad rehabendum terram*. 1 Sm. Laws, 64, note. In *Carlisle vs. Cunningham*, 1 Dall. 81, which was an application similar to that now before us, the reporter adds in a note: "I think the court recommended the *scire facias ad computandum* which issues in England, when tenant by *elegit* holds over." In *Mellon vs. Campbell*, 1 J. 418, Coulter, J., says: "Under the old statute of 1705, and under sections 52, 3, 4 and 5 of the act of 1836, if plaintiff held over, the defendant might have been driven to the *scire facias ad computandum*, and perhaps may resort to that remedy yet." In *Commonwealth vs. Straub*, 11 C. 144, Thompson, J., says, without reserve, that the *scire facias ad computandum et rehabendum terram* "was at an early period adopted with us in practice." And there can be no doubt that the writ of *scire facias* mentioned by the act of 1836, section 52, is this writ, which is thus recognized as one already familiar, and not requiring to be set out in terms or to be elaborately described. We are justified, therefore, in assuming that, under the act of 1705, and the practice authorized by it, the writ of *scire facias ad computandum et rehabendum terram* became one of the legal instruments for the use of the courts of Pennsylvania in the administration of justice, although we have not been able to find any reported case in which it actually issued prior to the act of 1836. Indeed, we may observe in this connection that there is no case in the books in which this writ has been directly before the courts, the only instance of its actual issue that we have found being in the case of *Heffner vs. Lazarus*, mentioned in *Heffner vs. Betz*, 8 C. 377, and *Commonwealth vs. Straub*, 11 C. 137.

Having thus become a part of the law of Pennsylvania, was the writ of *scire facias* taken away by anything in the acts of 1836 and 1840? We think not.

The act of 1836 is entitled "An act relating to executions," and it

does not refer to or repeal by express words the act of 1705, or any other act. It did not, therefore, repeal any part of that act or any practice founded on it, except so far as the earlier act or practice was inconsistent with or fully supplied by the later.

The act of 1840 is entitled "An act relating to Orphans' Courts, and for other purposes." As we have already said, the purpose of the repealing clause is not indicated, and there is nothing in it to lead us to infer an intention to destroy a remedy which existed under the law previous to the act of 1836, and which might in some cases be convenient, if not absolutely necessary, to the administration of justice under the unrepealed portion of that act. It may be, as was said by Mr. Rawle, in the argument of *McKelvy vs. De Wolfe*, 8 H. 374, that these sections of the act of 1836 were repealed because unnecessary.

We are of opinion, therefore, that the defendant may have a writ of *scire facias ad computandum et rehabendum terram*.

He may also, at his election, have his writ of ejectment, and a court of equity would entertain a bill for an account and re-delivery of the land. Story's Eq. Jur., pl. 510, 11.

Rule discharged.

W. W. Fell, Esq., for plaintiff.

Tennery, Esq., for defendant.

[Leg. Int., Vol. 29, p. 316.]

KITSON *et al.* vs. CRUMP.

1. A patentee having contracted to put up a patent elevator in a hotel, employed plaintiffs to do the work and furnish materials. The elevator was found unsuitable and was not finished: *Held*, that plaintiffs had no lien on the building, but must look to the patentee who employed them.
2. Those who furnish work for a building, whether with or without material, must inquire whether they are engaged by the general contractor for erection, or by one who has specially contracted with the owner to furnish the kind of work called for. If by the latter, they can have no recourse to the building, except that which a claim filed in his name and right may give them.

Opinion delivered September 28, 1872, by

LYND, J.—Crump, the builder and owner of the "Colonnade Hotel," contracted with Silver, who was the patentee of an elevator, to construct for and put up in said building one of his patent elevators. It was to be put up in a tower, to be built therefor by said Crump, and the side and other timbers thereof, to which said elevator was to be attached, were to be constructed in accordance with the directions to be given by said Silver. The latter was to be paid \$1700, part upon the completion of the work, and the balance at a specified time thereafter. Silver employed the plaintiffs to construct and put up the elevator, which they undertook to do according to the patentee's model and under his supervision. The price to be paid to them was not stipulated.

When the machinery was affixed to the tower, the cage attached and the elevator put in operation, it was found, by reason of the great and extraordinary noise attending its motion, to be unfit for hotel uses; it was not finished, and the machinery was afterwards taken out by Crump, and finally sold for storage. The defect was in the "machinery part" of the elevator. Lippincott, the foreman of plaintiffs, testified: "I do not consider it was a proper or fit elevator for a hotel. The principle

seemed to be imperfect." George L. Kitson, one of the plaintiffs, testified: "I have been a machinist for seventeen years. I saw the elevator work in the hotel. It was very noisy. I did not consider it was a fit elevator for a hotel; the design was wrong. . . . The noise was occasioned by the great number of small wheels spinning round. As the cage had to run up seventy feet in a minute, and the large wheel in that distance impinged upon each of the small ones, they would be left revolving at a high rate of speed and produce the noise."

The plaintiffs furnished all the materials and labor for the construction and putting up of this "machinery part," and for the value thereof have filed their claims.

This case is unquestionably ruled by *Harlan vs. Rand*, 3 Casey, 511. There, as here, the claimant had been employed by a patentee to put up the "principal part" of a patented heating and ventilating apparatus, which was removed after it was put up, because the building was thereby endangered to destruction by fire. The case is well reasoned by Lowrie, J., and upon his opinion the vindication of the nonsuit in question might be safely rested. But it may be well to submit an additional thought or two.

The fundamental purpose of the mechanics' lien legislation was undoubtedly to promote the erection of buildings. Material men and mechanics were to be encouraged to furnish their materials and labor for this purpose by providing for them an additional and surer means of payment than the personal security of the contractor, to wit, a lien not only upon the building, but upon the ground on which it was erected, and as much more of the adjacent ground of the owner as would be necessary for its proper enjoyment. No personal obligation is imposed upon the owner, nor does any claim fasten upon his land except through the structure erected upon it.

Where there is no building there can be no lien, however large the amount of materials that may have been supplied upon the belief that a building would be erected; and where materials are furnished in good faith for the erection of a building, which shall afterwards, in fact, be completed, a lien attaches, though none of the said materials shall be used in its erection. The lien attaches as of the time of the commencement of the structure, however late in the progress of it the labor or materials may have been furnished; and upon the destruction of the structure, even after its completion, as by fire or tempest, the lien ceases. *Church vs. Stetler*, 2 Casey, 246; *Wigton & Brooks' Appeal*, 4 Casey, 161.

The material man and mechanic not only take the risk of the actual erection and continuance of the building, but also of the title of the reputed owner of the ground. In the absence of title by the latter, they can look only to the personal responsibility of the contractor, or of the alleged owner in case the contract shall have been made with him. *Finley's Appeal*, 17 P. F. S. 453; *Bruner vs. Sheik*, 9 W. & S. 119; *Woodward vs. Wilson*, 18 P. F. S. 208.

Again, they are bound to see that the materials or work furnished are usual and proper for the building to be erected. This involves inquiry as to the proposed end in order to judge of the fitness of the means to the end. *Odd-Fellows' Hall vs. Masser*, 12 H. 507.

It is plain, therefore, that the mere delivery of materials, or the mere

application of labor for or to the construction of a building do not insure a lien upon it.

There should be inquiry as to the title of the alleged owner to the ground upon which the building is to stand; as to the authority of the contractor, whether for general or special erection; as to the kind of building or structure to be constructed, and as to the fitness of the required materials or labor for such building or structure.

The plaintiffs do not seem to have been aware of these principles, when they supplied the services and materials for which they claim. Had they understood that no right to charge the building would accrue to them unless Silver's undertaking to furnish an elevator suitable for a hotel was completed, and particularly if their labor and material were, in view of the intended result, wholly misapplied, they would probably have satisfied themselves of the merits of his mode of construction before they undertook the work for him. Good faith to Crump certainly required this; and even public policy, which should frown upon all waste, and not least harshly upon a waste of mechanical skill, might well be appealed to in support of such requirement.

It cannot be contended that the elevator in question was ever completed; indeed, it is distinctly alleged that there was so radical a defect in the principle of its construction, that it could never be satisfactorily completed. The plaintiffs even agreed that the work and materials might be removed by the owner; and they were so removed, and ultimately sold for storage.

The reservation by them, at the time of this agreement, that it should not impair their right of claim, if any, does not impair its force as an admission that the said materials were worthless where they were, and that the intended structure was incomplete. Otherwise they would have resented Crump's application for their consent to its removal as both an insult and an injury.

But the plaintiffs have contended that the case of *Harlan vs. Rand* was not a case in which the owner contracted directly with the patentee, and that where he so contracts, the building is bound, though the patented apparatus may prove to be useless. It may be that where the owner of ground knowingly contracts for the erection of a structure upon it that is fit for no occupancy or use whatever—a building in name only—that the building would be subject to lien. But no such result would follow where the thing contracted for was new and untested, and as to the operation or efficiency of which for the intended purpose no knowledge could be predicated of the owner—as to which certainly much greater knowledge must be possessed by the machinist who would undertake to erect it.

The owner certainly is not bound to determine, *a priori*, the merits of the invention. These are impliedly, if not expressly, guaranteed to him by the patentee; and as to him, this implied guarantee rests upon those who may be employed by the patentee to execute the work.

If the plaintiffs' employer, the patentee, had also been the owner of the building, their position and their claim would both be tenable.

But there is another principle upon which the nonsuit may be sustained.

The mechanics' lien legislation evidently rests the right of lien upon a contract relation direct or indirect with the owner of the building.

In the case of a general contract for erection, the contract is directly with the owner; and, if such contractor could do all the work and supply all the materials from his own resources, no other contract would exist, and his claim for the whole contract price would be the only one requiring protection from the statute.

But, in the nature of things, it is not practicable for one person to supply all the labor and materials. If a carpenter, he must employ a cellar digger, a stone mason, a bricklayer, a plasterer, a painter, and must buy of the dealers in stone, bricks, lime, glass, lumber, etc.; all these are sub-contractors.

It is in view of this necessity that the statute allows sub-contractors, whose contract relations with the owner are indirect, a lien for the materials or labor, or both, furnished by them; it makes the general contractor the agent of the owner to bind the building as to these necessary contracts with sub-contractors. But the right of the contractor to thus bind the building to others is strictly limited to this necessity.

Hence, one who undertakes to furnish work cannot impart a right of lien to those who assist him in doing the work, or who do the work for him. *Jobsen vs. Boden*, 8 Barr, 463; *Guthrie vs. Horner*, 2 J. 236.

One who undertakes to supply material cannot give a right of lien to those from whom he buys the said material, though they may mistakenly sell to him upon the credit of the building. *Duff vs. Hoffman*, 13 P. F. S. 191.

So a general contractor for erection of the whole building could not transfer to another the general duty of erection; nor can a contractor for the erection of a special part perform his general duty by another so as to entitle the latter to a lien for the labor and materials furnished. Where the transfer of a part of a duty is prohibited *a fortiori*, is the transfer of the whole duty unlawful?

One who contracts with the owner to do the carpenter work of a house, and supply the material therefor, may buy lumber, nails, etc., and a right of lien accrues to those who supply him with said materials. But those who do the carpenter work are merely his assistants, whether working by the day or by the job, and cannot sustain a lien for their services.

The law does not subject the building, upon the contract of a contractor for work, to more than one lien for one kind of work. It does not permit a contractor to sub-divide his work at his pleasure. If the painter undertakes to do the painting of a house, he cannot contract with one to paint the surbases, another the doors, etc., so as to give the latter a right of lien. These are bound to understand the law in its spirit as well as in its letter. By the letter journeymen should have a lien; but the spirit of the law precludes them. The spirit equally precludes all those whom the contractor substitutes for himself; all those to whom he transfers his duty, whether a general or special one, whether in whole or in part.

Substantially the plaintiffs undertook to do the very work involved in Silver's contract, which was to furnish the necessary materials and to do all the work required in giving them proper form and figure, and in so putting them together in the tower prepared for the purpose as to

constitute an elevator, after the model and plan of said Silver. He testified: "The machinery part of the elevator was built after the model shown to Mr. Crump, and by which plaintiffs were to work. . . . The plaintiffs furnished *all* work, labor, and material for the machinery part of said elevator at my request." Kitson, one of the plaintiffs, testified: "The work and materials were furnished for the Colonnade Hotel, and were ordered by Mr. Silver, for an elevator which he said he was to put up there. Mr. Milburn superintended the erection." Mr. Milburn was an employ  of the plaintiffs, and superintended this erection for them. Plaintiffs contend that there was not a transfer of Silver's duty of erection to them, because the tower was to be furnished by Crump, under Silver's directions as to certain timbers, and because the cage was not to be provided by them. We do not think that this contention requires any comment. To allow the plaintiffs' claim, would be to subject the owner, through his building, to two demands for substantially the *same* work, i. e., to that of Silver for the contract price, and to that of the plaintiffs for the actual value.

Those who furnish work for a building, whether with or without material, must inquire whether they are engaged by the general contractor for erection, or by one who has specially contracted with the owner to furnish the kind of work called for. If by the latter, they can have no recourse to the building, except that which a claim filed in his name and right may give them.

Rule discharged.

Frank Wolfe, Esq., for plaintiff.

M. Arnold, Esq., for defendant.

[Leg. Int., Vol. 29, p. 316.]

BERENS *vs.* RASCH *et al.*

In an action on an insolvent's bond, the breach assigned being that the insolvent did not give the notice of hearing to his creditors required by law, the record of the insolvent's discharge is not conclusive evidence against the plaintiff that the insolvent did give such notice.

Opinion delivered September 21, 1872, by

THAYER, J.—The narr was upon an insolvent's bond. The breaches assigned were that the said William Rasch did not appear at the next term of the said Court of Common Pleas after the date of said bond and then and there present his petition for the benefit of the insolvent laws, and did not comply with all the requisitions of said laws, and did not, in default thereof, surrender himself to the jail of said county. To this the defendant pleaded but one plea, averring that the said William Rasch did appear at the term of the Court of Common Pleas of said county next after the giving of the said bond, and did then and there present his petition for the benefit of the insolvent laws, and did comply with all the requirements of the said laws and abide all the orders of the said court in that behalf, and obtained his final discharge, "as by the record of the said proceedings more fully appears, and this the defendants are ready to verify by the said record. Wherefore, they pray judgment," etc.

The plaintiff filed a replication to this plea, which, when the case came on for trial, was withdrawn by leave of the court, and a new replication filed in its stead.

In this replication, the plaintiff averred that the said Court of Common Pleas, by a rule of said court, fixed the 22d day of November, 1869, for hearing all petitions for the benefit of the insolvent laws filed at the term of said court next succeeding the date of the execution of said bond; that the said William Rasch did not appear before said court on said 22d day of November, 1869, nor at any day during said term, and that the said William Rasch did not give or cause to be given to said plaintiff any notice whatsoever of any petition of said William Rasch, for the benefit of the insolvent laws, fifteen days, nor any time before the said 22d day of November, 1869, or before any day of said term, "and this the said plaintiff is ready to verify," etc.

This was the state of the record when the case came on for trial. The plaintiff's counsel then called upon the defendants' counsel to file a rejoinder to the replication or to demur thereto, which the defendants' counsel declined to do. A continuance was not moved for and the fact not being brought to the notice of the court that no other plea had been filed than the one already mentioned, to which the plaintiff had replied specially and to which replication there was no rejoinder, the case was proceeded with, and after hearing the plaintiff's witnesses, a nonsuit was ordered under the act of 1836. Subsequent to the entry of the nonsuit the defendants, by leave of the court, filed a rejoinder *nunc pro tunc* to the plaintiff's replication. This rejoinder was substantially a repetition of the plea. It averred that the said William Rasch did appear at the next term of the Court of Common Pleas succeeding the date of the said bond, and that he complied with all the orders of the said court in that behalf, and obtained his final discharge; and the rejoinder, like the plea, ended with a verification by the record. To this rejoinder the plaintiff demurred specially, assigning for cause that it does not answer the replication, inasmuch as it does not traverse the averment of the replication that the said Rasch gave no notice of the hearing of his petition before the 22d of November, 1869; that it is evasive, and sets up a record as conclusive of a fact of which it is not conclusive. Thus it will be seen the pleadings in the cause have resulted in an issue of law. There was no issue of fact between the parties to be tried by a jury at the time of the trial. A careful inspection of the record shows that there never has been any such issue. It was an error, therefore, to have proceeded with the trial by jury when there was nothing for them to try, and it follows necessarily that the nonsuit must be taken off.

It remains for us to decide the question which has arisen upon the demurrer. The replication must be regarded as in the nature of a new assignment of the plaintiff's cause of action; that is, it re-states the cause of action in a more minute and circumstantial manner—a form of pleading which is allowable in debt and assumpsit as well as in trespass. The defendants, in their plea, had traversed the general averment that Rasch had not complied with all the requisitions of the insolvent laws, and concluded with a verification by the record. Thereupon the plaintiff makes a new assignment, wherein he avers, among other breaches of the condition of the bond, that Rasch gave him no notice whatever of any hearing of his petition fifteen days, nor any time, before the day fixed for the hearing thereof, viz., November 22d, 1869, or before any day of said term; thus reducing to a precise statement of fact the general allegation

contained in the narr, and specifying the particular points in which the defendants had failed to comply with the requirements of the law and the exigency of their bond. The defendants, instead of taking issue upon the particular facts relied upon by the plaintiff, as establishing a forfeiture of the bond, content themselves in the rejoinder with a simple reaffirmance of what was contained in their plea, viz., that Rasch complied with all the orders of the court and obtained his final discharge in accordance with the acts of assembly, and they vouch the record of his discharge as conclusive proof of it. He is charged with a particular neglect, and they answer, he did all the law required him to do. He is charged with not having given the notice which the law requires, and they answer, not that he gave the notice required by law, or that he gave any notice whatever, but generally, that he obeyed the laws, and his discharge concludes you from denying it.

It is a fundamental rule of pleading that a traverse must be taken on matter of fact and not on a mere conclusion of law, for to raise an issue upon a legal inference would be to submit to the jury that which is in the province of the court to decide. This was perfectly understood by the defendants, and they accordingly abstained from concluding to the country, and demanded a trial by the record. Their position is (and they have adhered to it in the pleadings from the beginning) that Rasch's discharge by the court is conclusive evidence that he complied with all the conditions of his bond, and that the plaintiff cannot be permitted to show the contrary. The defendants have deliberately staked their whole case upon their ability to maintain this proposition. If they can maintain it, they ought, nevertheless, as good pleaders, to have traversed the allegations of fact, and not to have alleged in answer to facts a conclusion of law; but notwithstanding this, judgment might, in that event, be entered for them on the whole pleadings, because if the position which they have taken in the pleadings and upon the argument is a correct position, then the plaintiff's replication is bad, for it was not competent for him to set up the facts contained in the replication in answer to the defendant's discharge averred in the plea. The question of law which is raised by the demurrer is, therefore, whether the record of an insolvent's discharge is conclusive evidence that the insolvent has given to his creditors the notice of hearing required by the 11th section of the act of June 16, 1836—so conclusive that nothing can be averred or shown in contradiction of it.

In *Will vs. Schreiner*, 4 Yeates, 352, it was decided that the discharge was *prima facie* evidence of the service of notice on the creditors. No more was decided. Breckenridge, J., thought the record no evidence at all of the service of notice. Tilghman, C. J., was of opinion that the record was *prima facie* evidence of the service of notice, but that it might be repelled by other proof. The court decided that it was *prima facie* evidence. The case did not require them to decide any more. In *Sheets vs. Hawk*, 14 S. & R. 173, which was much relied on by the defendant's counsel, the case was this: Hawk gave a bond to appear before the Court of Common Pleas on the first Monday of August, to take the benefit of the insolvent laws, to comply with all things required by law, and to abide by all orders of the court. He appeared at the prescribed time and presented his petition. The court appointed the first Monday

of the next term for a hearing, which was the 4th of November. The record showed that he appeared on the 7th of November and was discharged. It was contended for the plaintiff, that inasmuch as the record did not show any appearance by Hawk on the 4th of November, he had forfeited his bond. It appeared by the defendant's evidence that it was the practice of the court, on the application of the insolvent's attorney at the time fixed for the hearing, to continue the case to some other day during the term. That on the 4th of November such an application had been made by Hawk's attorney, and a continuance granted from day to day, until his discharge on the 7th of November. The plaintiff stood entirely upon the record, and insisted that inasmuch as the record showed no appearance by Hawk until the 7th of November, the necessary inference was that he did not appear on the 4th of November. The Supreme Court held, that no such presumption arose upon the record; that on the contrary the term was in strictness but one day, that continuances from day to day were not usually entered as continuances from term to term are, that it was not only consistent with the record that Hawk had appeared on the 4th of November, but that it must be presumed that he had from the fact of his discharge on the 7th. This was the extent of the decision. It will thus be seen in the first place that the first proposition of the syllabus of the case of *Sheets vs. Hawk* is framed by the reporters in terms much broader than are warranted by the decision; and in the second place, that the question, whether the discharge is conclusive of the giving of the notice to the creditors required by law, was neither raised nor decided. In *Lease vs. Asper*, 2 Rawle, 182, in an action on the bond of an insolvent debtor, whose discharge had been refused, the defendant offered to show by parol evidence that the court ought to have discharged the petitioner instead of rejecting his petition. It was held that he could not be permitted to do so, that the decree of a court of competent jurisdiction could not be reversed by parol evidence in a collateral proceeding. So in *Loughry vs. McCullough*, 1 Barr, 503, the defendant was not allowed to show his discharge by parol. The only point decided in *Knox vs. Flack*, 10 H. 337, was that where the affidavit appended to an insolvent's petition appeared by the record to have been made before the prothonotary, when in truth it was made in open court, it was competent for the court to allow the error to be corrected by a supplemental affidavit, showing that the oath was made in open court. These are the cases upon which the defendants rely to maintain the position that an insolvent's discharge is, in an action on his bond by a creditor, founded upon the insolvent's neglect to give the notice of hearing required by law, conclusive against the plaintiff. We are unable to see that these cases afford any warrant for such a conclusion. What is said in the opinion of a judge must be construed with reference to the particular case which he is deciding, and it is a familiar principle that the authority of the decision extends no further than to the very point adjudged by the court. It is absolutely necessary to adhere to this principle, unless we are to substitute the general propositions and isolated expressions of individuals in the place of the steady and concentrated light of judicial judgment. To affirm any general proposition of law which shall be true in all cases, between all persons, and under all circumstances, without any exception, is to attempt what experience

shows to be seldom possible. While some of the general propositions contained in the opinions delivered in some of the cases which have been referred to might, if disconnected from the particular case in which those propositions were laid down, be considered broad enough to affirm the point which the defendants make in the present case, yet it will be found upon careful investigation that those cases do not decide the point which is raised in this case, and furnish no secure foundation upon which the defendants can stand. There is, in fact, so far as we know, no express decision in this State upon the point now before the court, and we must look to other sources than the cases which have been cited for the materials for our judgment. It must be borne in mind that the plaintiff is not now seeking to overturn the decree by which the defendant was discharged. His action is upon a statutory obligation which he alleges the defendant forfeited in obtaining the decree in the manner in which it was obtained. If the defendant obtained his discharge without notice to his creditors, and is now permitted to say that the creditors are estopped by the decree from showing that he did not give notice, then they are in a bad case indeed, for the very injury which has been inflicted upon them is given as an excuse why they should not have redress. If this be the law, the path of insolvents in future is a very plain and easy one, although not very conducive to justice. They have only to abstain from giving notice, and having obtained their discharge, contrary to law and in violation of their obligations, to set their creditors at defiance. The decree is to be obtained without notice, and perhaps in consequence of that fact, and then the creditors' mouths are to be stopped by the decree. It must be some very stout and stubborn principle of law which can successfully prop such a manifest injustice, and some very express and binding authority which can prevent us from overleaping such an obstacle to reach the justice of the case.

A judgment is conclusive of the very matter in controversy, but not of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. This was part of the rule laid down by Chief Justice De Grey in the *Duchess of Kingston's Case*, 20 Howell's St. Tr. 538, and which was expressly adopted and applied by the Supreme Court in *Hibsham vs. Dulleban*, 4 Watts, 183, where it was held that a party was not estopped in an action at law from denying the validity of a release by a decree of the Orphans' Court in another proceeding between the same parties, although the validity of the release had been determined in those proceedings, and was a part of the foundation of the decree. The rule is concisely stated by Lord Holt in *Blackham's Case*, 1 Salk. 290, where he says, that though a matter directly determined by the judgment cannot be gainsaid, yet the principle has regard but to a point directly tried, and not to a matter collaterally inferable from it. The rule was also distinctly recognized in *Lentz vs. Wallace*, 5 Har. 412, and again in *Martin vs. Gernandt*, 7 Har. 124.

In the present case the plaintiff cannot gainsay the defendants' discharge, nor is it necessary for him to do so. That the defendant gave the notice to his creditors which is required by law is not shown by the rejoinder to have been a matter which was either litigated or decided at his hearing. The defendants say that it is to be inferred from the fact

of his discharge, and they argue that he was not entitled to his discharge unless he gave the notice required by law, and therefore that he must have given the notice or he would not have been discharged. But this is mere argumentative inference. It was not the point directly tried, but a matter collaterally inferable from the point tried, and so is within the rule that a judgment is conclusive only of matters directly in controversy, but not of questions incidentally cognizable, or of inferences to be drawn from the decision of the matter in controversy. Upon the matter of law, therefore, upon which the defendants have rested their case, we have come to a conclusion adverse to the position which they have endeavored to maintain, and are of opinion that the rejoinder is not a sufficient answer to the plaintiff's replication, and is bad in law.

The rule to take off the nonsuit is made absolute, and judgment is now entered for the plaintiff upon his demurrer to the defendants' rejoinder.

Isaac Gerhart, Esq., for plaintiff.

Robert Palethorp, George W. Wollaston, Thos. Greenbank, and Wm. S. Price Esqs., for defendant.

[Leg. Int., Vol. 29, p. 30.]

HAIGHT *et al.* vs. KREMER.

Plaintiffs paid defendant as agent of an insurance company a premium of \$99, which was not paid over to the company, and a fire occurring, the plaintiffs compromised, taking \$274.12 less than the adjusted loss: *Held*, that the difference could not be recovered from the agent, but that the \$99 was evidently not embraced in the settlement.

Opinion delivered September 16, 1872, by

BRIGGS, J.—The plaintiffs paid to George Griffin, who was acting for the defendant, \$99, in consideration of which the defendant promised and undertook to procure for the plaintiffs a contract of insurance by the Exchange Insurance Company of New York, of the stock, machinery, etc., in the plaintiffs' building in this city. The defendant procured a policy issued by the said company in the sum of \$2000, and delivered the same to the plaintiffs. Soon after this, the company wrote to the plaintiffs, informing them that the company had not received the premium, and, in consequence, they were not insured. The plaintiffs then sought the defendant, and exhibited to him the company's letter.

He replied that they were insured, and that he would make it right with the company. In a short time after this interview, the property was destroyed by fire, and the amount of loss apportioned by the adjusters for this company to pay was \$1274.12.

When the plaintiffs demanded payment of this sum of the company, it was refused upon the ground that the policy was not valid, in consequence of the premium not having been paid to the company. However, rather than be subjected to the annoyance of a suit, the company paid the plaintiffs in compromise \$1000, and, at the same time, gave them a receipt for \$100, premium which had not before been paid.

The plaintiffs sought to recover of the defendant \$274.12, the difference between the \$1000 and the sum mentioned in the policy—and also the \$99 paid by them to the defendant.

Upon this evidence I directed a nonsuit, being of the opinion that the payment of the \$1000 by the company, and its acceptance by the plaintiffs, was a waiver of the objection that the premium had not been paid, and the ratification of the policy as a valid contract of insurance, and hence the plaintiffs were estopped from maintaining this action.

While we are of the opinion that this view is correct, as applicable to the amount of the insurance, it cannot be extended to the \$99 paid by the plaintiffs to the defendant; for it is quite clear that neither the plaintiffs nor the company meant to embrace that sum in the settlement. It follows, hence, that I erred in withholding that from the consideration of the jury.

The rule to take off the nonsuit is therefore made absolute

John Dolman, Esq., for plaintiffs.

Jos. C. Ferguson, Esq., for defendant.

[Leg. Int., Vol. 29, p. 308.]

HAINES *vs.* BEQUER.

A broker having brought the parties together, and a contract having been made enforceable in a court of equity, is entitled to his commission.

Opinion delivered *September 21, 1872*, by

BRIGGS, J.—It was supposed that the case of *Pratt vs. Patterson*, and *Brenan vs. Perry*, 7 Philada. Rep., pp. 135 and 242, ruled this case. An analysis of those cases, however, shows that in the former the contract failed of completion, in consequence of the parties not being able to agree upon the manner of the valuation of the clothing to be given as the consideration for the house; and in the latter, that no agreement at all had been made between the proposed purchaser and seller.

In this case, giving effect to the plaintiff's offer, a contract of purchase and sale had been made in writing, and by reason of the defendant's refusal to perform, a conveyance of the farm was not affected. This contract put the equitable title in the purchaser, and this carried with it his right to a decree for a conveyance of the legal title, which would perfect the contract of sale, and thus make the plaintiffs claim for commissions complete.

Since the nonsuit was entered, the case of *Keys vs. Johnson*, 18 P. F. Smith, 42, has been reported; and it seems to imply that all that is required to entitle a real estate broker to his commissions is, that he bring the parties together, and that they enter into a contract of purchase and sale.

It follows that the rule to take off the nonsuit should be made absolute.

Rule absolute.

I. Newton Brown, Esq., for plaintiff.

Thomas J. Diehl, Esq., for defendant

[Leg. Int., Vol. 29, p. 382.]

HAMILL vs. RAWLSTON & JONES, trading as RAWLSTON & Co.

A warrant of arrest under act of July 12, 1842, can only be issued where the fraud alleged grows out of the fraudulent *contraction* of the debt.

Warrant of arrest under act of July 12, 1842.

December 16, 1872. Sheriff returns *non est* as to Rawlston, and produces the body of defendant Jones.

Case continued until November 30, 1872.

November 30, 1872. Defendant's counsel moves to quash the warrant. Motion argued, and held under advisement until December 2, 1872.

December 2, 1872. Warrant quashed, and defendant discharged.

Opinion delivered by

BRIGGS, J.—It is true the affidavit upon which this warrant was issued alleges that the debt was fraudulently contracted, but the facts therein set forth do not support such conclusion, but show, if anything, the fraudulent retention or embezzlement of the plaintiff's money. The act of July 12, 1842, was not passed for such a case, and left the remedy as it was before its passage, as in *trover*, *deceit*, and cases of pure *tort*. *Sedgebeer vs. Moore*, Bright, 197; *Bowen vs. Bendick*, 5 P. L. J. 113; *Bugle vs. Radley*, 1 T. & H. Pr. (Fish), 284; *Tryon vs. Hassenger*, 4 B. 221; *Commonwealth vs. McCabe*, 10 H. 450.

That act prohibits arrest upon civil process only in suits instituted for the recovery of money due upon judgment or decree founded upon *contract* or upon *contracts express or implied*. Nor can proceedings be had under the act unless the affidavit aver facts showing that the fraud alleged grows out of fraudulent *contraction* of the debt. If there was no *contract* between plaintiff and defendants authorizing the defendants to receive the money from Jamison, no remedy is given by the act of July 12, 1842.

Looking only to the facts alleged in the affidavit, no contract or authority is shown to warrant the defendants in receiving this money. Indeed, the plaintiff's theory is, they had no right to receive it. Such being the case, proceedings under the act of July 12, 1842, will not lie.

When the affidavit was presented to me, I thought it exhibited a case of fraudulent contraction of the debt, but upon a more critical examination, upon the motion to quash, I am satisfied it does not.

Being of the opinion that the warrant was improvidently issued, it is now quashed, and the defendant, Paul T. Jones, is discharged.

H. J. McCarthy, Esq., for plaintiff.

M. J. Mitcheson, Esq. (with whom was George W. Biddle, Esq.), for defendant Jones.

[Leg. Int., Vol. 29, p. 309.]

THOMPSON *et al.* vs. GRAHAM *et al.*

Where defendants had come into possession of real estate as tenants of plaintiff, it is not necessary that title should be shown out of the Commonwealth. A tenant cannot set up an adverse title against the lessor.

Motion for rule for new trial. Opinion delivered *June*, 1872, by

MITCHELL, J.—This was an action of ejectment for one undivided seventh of a house and lot in Front street. Plaintiffs deduced title through sundry mesne conveyances, from Richard W. Wells and wife, by deed made in 1847. They then gave in evidence a letter of attorney, dated April 16, 1856, from the parties owning the entire property (including plaintiffs' predecessors in the title to the one-seventh, now in suit), to William F. Griffiths, as attorney in fact, and a lease by Griffiths, under said power, to one Rutter, for fifteen years from June 7, 1856. They then called Griffiths, and proved by him that defendants went into possession of the premises as assignees of the said term to Rutter, and that the lease had expired. Thereupon plaintiffs closed, and defendants moved for a non-suit, on the ground that plaintiff in ejectment could not recover without showing title out of the Commonwealth. This was refused, and we think properly. Plaintiffs having shown that defendants came into possession as tenants, it was not competent for the latter to attack the title by showing a better one in any third person. We see by no reason why title in the Commonwealth should be treated as any exception to the general rule.

The defendants then offered to show that they did not hold under the lease from the plaintiffs, and gave in evidence for that purpose the will of Samuel P. Griffiths, and a lease for the premises in dispute from W. F. Griffiths and others, to defendants, dated May 9, 1871, for fifteen years from June 1, 1871. They then recalled W. F. Griffiths, who proved that defendants had gone into the possession of the premises as assignees of Rutter, under the first lease, which expired in June, 1871; that shortly before the expiration of this first lease, namely, May, 1871, the witness, as attorney in fact of the owners of six-sevenths of the property, made a new lease, under which the defendants now claimed to hold. In making this new lease, it was admitted that Griffiths acted under a power of attorney from the owners of six-sevenths of the premises, but *without authority from the plaintiffs, and with express notice to him and to defendants that the plaintiffs refused to make a new lease for the portion represented by them.* He testified that when the defendants took the new lease they knew that he had no authority from plaintiffs, and that their title was denied. Griffiths also testified, what was admitted by both sides, that Richard W. Wells died in 1852, and his widow, Abigail Wells, in 1871, just before the new lease was executed. Thereupon defendants closed, and requested the judge to charge, "that if the jury find, that at the time of bringing this suit, the defendants were in possession, under a lease to which plaintiffs were not a party, and refused to become a party, and that the defendants were at the time of taking said lease informed of this, and also knew that those who joined in it as lessors claimed to be sole owners at the date of said lease, the defendants are not estopped from showing that the plaintiffs had no title

at the time of the issuing of the writ in this case." The judge declined to affirm this point, and charged the jury, that if they believed that defendants originally came into possession of these premises, under the title of the plaintiffs, no subsequent title acquired from any other party would be a defence to this action.

Now, upon the case as presented, it is clear there was no error, either in negating defendants' point, or in the affirmative words of the charge. The defendants' case was a naked attempt to set up a new title, hostile to that under which they went into possession. We need not cite authorities to show that this could not be permitted. But it was strenuously contended by defendants' counsel, upon this motion, that the evidence showed that the title of plaintiffs during the first lease had *expired* prior to the making of the new lease. This point was not made by the defendants at the trial, and they could not justly complain if we held them to the case, as they chose then to present it; but anxious to avoid any failure of justice, we have examined the evidence more carefully than was possible in the hurry of a trial, and are satisfied that, even in this view, the defendants' case is without merit. The facts disclosed are these: Samuel Powel Griffiths, by his will, made in 1820, devised, *inter alia*, one undivided seventh of his estate to William F. Griffiths, Joseph Parker Norris, and Dr. Joseph Parrish, in trust, to hold the same during the natural life of testator's daughter Abigail, wife of Richard W. Wells, for her sole and separate use, etc., etc., "but if my said daughter shall survive her said husband, then to convey the real estate, etc., to her, my said daughter, Abigail, her heirs, etc., absolutely, and forever." Mrs. Wells being thus the owner of the equitable estate, joined with her husband in a conveyance by deed, dated November 19, 1847, separately and duly acknowledged, of all her right and title to William B. Goddard, from whom plaintiffs derived title. R. W. Wells having died in 1852, the trust estate of Mrs. Wells determined, and the legal title by the express limitation of the trust vested in her. She survived until the spring of 1871, and died just before the expiration of the first lease to defendants.

Upon these facts, defendants claim that the title of the plaintiffs, as grantees of Mrs. Wells, though valid during her life (during which the first lease was made), *expired* at her death, and this without showing any act or proceedings by herself, her trustees, or her heirs, in any way affecting the validity of her deed.

Where a person having no title to land conveys the fee by deed, and subsequently acquires a title, the title inures to the benefit of the grantee, by estoppel against the grantor, and all claiming under him. *Brown vs. McCormick*, 6 W. 60; *Wolf vs. Goddard*, 9 W. 547; *McWilliams vs. Nisely*, 2 S. & R. 515. The deed of Mrs. Wells passed a good title against her during her lifetime, and against her heirs after her death, and we do not see, therefore, how her death produced any *expiration* of the plaintiffs' title.

We may remark in conclusion, that the assumption of the counsel for defendants, that Mrs. Wells' title to the premises in dispute was derived from the will of her father, Dr. Samuel P. Griffiths, seems to us of very doubtful foundation, particularly as it is in direct contradiction to the recitals of the deed from her to Mr. Goddard, from whom the plaintiffs claim.

Those recitals show that Mrs. Wells claimed her ownership under the will of Mrs. Deborah Morris, who had bequeathed the premises to Samuel P. Griffiths, for the term of ninety-nine years, if he should live so long, "and from and after the decease of said Samuel Powel Griffiths, then to the issue of his body legally begotten, to be equally divided between them," etc., and that Mrs. Wells was one of seven children of the said Samuel P. Griffiths.

The defence assumed that the will of Mrs. Morris gave the whole estate to Dr. Griffiths, but we think this erroneous.

"A bequest of personalty," as this term of ninety-nine years undoubtedly is, "to one for life, with a remainder to his issue, does not confer an absolute estate upon the first taker . . . a remainder given to heirs may: a remainder to issue does not." Strong, J., in *Sheets' Appeal*, 2 P. F. S. 268, and *a fortiori*, this is so when the word "issue" is followed by words of distribution, as it is here: Hawkins on Wills, 197; *Myers' Appeal*, 13 Wr. 112.

But none of these questions were raised at the trial: the defendants' case as presented there, and shown by the only point presented to the court, was simply an attempt to set up an adverse title against their lessors, and although we do not see that the adverse title was at all made out, it is sufficient to say, that even if it were fully established, it could not be set up as a defence to this action.

Rule refused.

E. Spencer Miller, Esq., for the motion.

Silas W. Pettit, Esq., contra.

[Leg. Int., Vol. 29, p. 320.]

RECORDS & Co. vs. THE PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD COMPANY.

Though words implying in a popular sense a bargain and sale are to be restricted, in their signification, to carry out the intention of the parties, such intention must be manifest, or full effect should be given to their popular meaning. An executory contract may afterwards be converted into a complete bargain and sale by the appropriation of specific goods to the contract.

A contract whereby E. sold M. 100,000 feet of lumber, fixed the price per inspection, and appointed B. to inspect it: *Held*, that certain lumber—that in suit—part of the 100,000 feet mentioned in the contract, upon inspection became appropriated to the contract, and the title thereto vested in M.

Inspection of a part only of the 100,000 feet will not affect the purchaser's right to so much, or prevent title thereto vesting *eo instanti* with inspection, if they assent to receive it.

Opinion delivered September 16, 1872, by

BRIGGS, J.—The defendants' company transported for the plaintiffs six car-loads of poplar lumber from Baltimore to this city, and upon its arrival here ran it into the yard of Stevenson & Maris, where the company usually stored lumber carried by them, till taken possession of by the owner, and sent the bill for the freight to the plaintiffs. The plaintiffs then sought Stevenson & Maris, and made arrangements with them to procure men to unload the lumber and store it in their yard. They accordingly had the lumber unloaded, and while it was thus stored, one of the plaintiffs called upon Maule Bro. & Co., and requested them to examine it with the view of purchasing it. They accordingly went to

Stevenson & Maris' yard and examined it, and repaired to the plaintiffs' place of business in this city, when the following contract was entered into for the purchase and sale of this lumber as a part of a larger quantity, the balance not being on hand :

"PHILADELPHIA, Dec. 16, 1870.

"Sold Maule Bro. & Co., 100,000 feet of $\frac{1}{2}$ poplar lumber, to be dry, at

"\$32 $\frac{1}{2}$ per M feet for panel, 14 inches wide and over.

"\$22 $\frac{1}{2}$ per M feet for panel, 2d quality.

"\$12 per M feet for culls.

"To be inspected by John D. Beers. Freight to be paid in cash. Balance cash on or before January 15th, or a note at three months, at the option of the seller.

"MAULE BRO. & CO.

"M. RECORDS & CO."

The lumber which is the subject of this suit, though a part of the 100,000 feet, was an entire lot by itself, the balance the plaintiffs were to furnish thereafter.

Beers was a regular inspector of lumber, and inspected these six car-loads in accordance with the classifications designated in the contract, and rendered a bill of his inspection to each of the parties.

Whereupon Maule Brother & Co. took possession of the lumber, paid the freight as provided by the contract, and wrote to the plaintiffs that they were ready to give them a check for the amount.

The plaintiffs were not satisfied with the inspection, and on that account declined to receive the check. Beers was three or four days in measuring and inspecting the lumber, and according to his testimony he inspected every board.

The plaintiffs did not deny that Beers made the inspection, but alleged that he did it unfairly to them.

And while the evidence showed that they were dissatisfied, there was no testimony tending to show fraud in the inspection, or that Maule Bro. & Co. knew, when they took possession of the lumber, that the plaintiffs were dissatisfied with the inspection.

Upon these facts I charged the jury as follows:

"The effect of the contract of December 6, 1870, between Maule Bro. & Co. and the plaintiffs, was to sell 100,000 feet of $\frac{1}{2}$ poplar lumber, at the price therein named, to be inspected by John D. Beers.

"If this lumber, the lumber in controversy in this suit, is part of the 100,000 feet mentioned in the contract, the plaintiffs, by that contract, sold this lumber to Maule Bro. & Co., and the verdict should be for the defendants. If it is not, the verdict must be for the plaintiffs for the value of the lumber."

To this charge the plaintiffs took a general exception, and now, on the motion for a new trial, complain that it treats the contract as a sale of the lumber in the stead of an agreement to sell it.

Interpreting this contract by its language and circumstances, it is obvious that the parties meant to sell these six car-loads to Maule Bro. & Co. upon Beers' inspection.

The lumber was an entire lot by itself, consisting, according to Beers' inspection, of seventy-eight thousand eight hundred and eighty feet.

The plaintiffs were anxious to sell it, having no place of their own in

which to store it, and in consequence sought Maule Bro. & Co., and requested them to purchase it. Then the language employed is that usually indicating a sale. The words are: "Sold to Maule Bro. & Co."

It is true that even words which in their popular sense imply a bargain and sale are to be restricted in their signification, so as to carry out the intention of the parties using them.

And where it is apparent that such words mean only an agreement to sell and not an actual sale, they should be read in a restricted sense rather than in accord with their literal and popular import.

But it is equally true, that unless it is manifest that it is the intention of the parties employing them that they should be restricted, full effect should be given to their popular meaning.

What is there in this case to modify the import of the language of the contract? The contract fixed the price, appointed Beers to inspect the lumber for both parties, required Maule Bro. & Co. to pay the freight, and left the plaintiffs nothing whatever to do, except to declare whether they would receive the balance of the purchase-money, after the payment of the freight, in cash or a note, and this they were bound to do before Maule Bro. & Co. could pay for the lumber thus sold to them. And the plaintiffs' refusal to declare their option cannot be construed to the disadvantage of any but themselves. When the lumber was inspected it became, as it were, ear-marked, and appropriated to the contract. The inspection enabled the parties to determine the amount which the purchasers were to pay for the lumber, and thus the contract became a perfect bargain and sale.

Mr. Benjamin in his work on the Sales of Personal Property, p. 247, gives the law thus: "After an executory contract has been made, it may become converted into a complete bargain and sale by specifying the goods to which the contract is attached, or, in legal phrase, by the *appropriation* of the specific goods to the contract.

"The sole element in a perfect contract is then supplied. The contract has been made in two stages, but is none the less one contract, namely, a bargain and sale of goods, as was said by Holroyd, J., in *Rhoades vs. Thwaite*, the selection of the goods by one party, and the adoption of that act by the other, converts that which was before a mere agreement into an actual sale, and the title thereby passes. Whether we regard these six car-loads as a lot by itself, as a part of the 100,000 feet, or an unascertained part hereof, the effect of the inspection was to vest the title in the lumber in Maule Bro. & Co., that being the only thing to be done to ascertain the quantity and fix the sum to be paid for it."

All of the authorities are to this point. Some only need be cited.

Hutchinson vs. Hunter, 7 B. 140; *Dennis vs. Alexander*, 2 B. 30; *Winslow vs. Leonard*, 12 H. 14; *Golder vs. Ogden*, 3 H. 528; *Hanson vs. Myers*, 6 East. 614; *Rugg vs. Minnett*, 11 East. 209; *Aldridge vs. Johnson*, 7 Ellis & Blackburn, 896; *Summons vs. Swift*, 5 B. & C. 857.

Nor does the fact that but a part only of the 100,000 feet had been inspected affect the principle, so long as the vendees were willing to accept the portion inspected. In *Rugg vs. Minnett*, a part only of the turpentine purchased had been put in the casks, when a fire occurred destroying the entire lot, and it was held that the purchaser was liable for that put into the casks, and not for the balance. In *Aldridge vs. Johnson* the

plaintiff bought one hundred quarters of barley in bulk with a much larger lot, and sent sacks to the vendee to put the barley in: one hundred and fifty-five of them were filled with about one-half of the barley purchased when a commission of bankruptcy was issued against the vendor. He then emptied the barley back into the bulk from which it had been taken. The purchaser brought his action to recover the one hundred quarters purchased, against the bankrupt's assignees.

In disposing of the case, Lord Campbell, C. J., said: "I think no part of what remained in bulk ever vested in the plaintiff . . . No rule of law of purchaser and vendor is clearer than this; that until *appropriation* and separation of a particular quantity or signification of assent to the particular quantity, the property was not transferred.

"Therefore, except as to *what* was put into the 155 sacks, there must be judgment for the defendants.

"It is equally clear as to what was put into those sacks, there must be judgment for the plaintiff. Looking to all that was done when the bankrupt put the barley into the sacks, *eo instanti*, the property in each sackful vested in the plaintiff."

Applying the doctrine of these cases to the one under consideration, it seems clear that the lumber inspected became appropriated to the contract, and the title to it, thereupon, passed *eo instanti* to the vendees. And why should the fact that but a part of the whole had been inspected affect the purchasers' right to so much, if they assent to receive it? The delivery of the balance is a duty imposed upon the plaintiffs, and their refusal or even inability, from no cause of the purchasers, to furnish it, should not affect the rights of the vendees.

The justice of the case would seem to be that they be allowed to retain what had been inspected, and seek redress if they desired it of the vendors, for not furnishing the balance.

Nor does the case of *Nicholson vs. Taylor*, 7 C. 128, so earnestly pressed by the plaintiffs' counsel, conflict with the doctrine of the cases above mentioned, but it is rather in accordance with such doctrine.

In that case the contract was for a load of Pine Creek lumber in the actual possession of Taylor & Co. Before anything had been done pointing to the performance of the contract, the latter discovered a material error as to quantity, which they charged the plaintiffs knew, and hence refused to deliver the lumber. The court held that the lumber not having been measured, and till that had been done the amount to be paid for it could not be ascertained, the title to it remained in the vendors; and that the special action on the case counting in trover for the lumber would not lie. Whereas, in this case, as already shown, the lumber was measured and inspected, and everything done to put the title to it in the vendees.

The title to the lumber thus vesting in Maule Bro. & Co. gave them the right of immediate possession, unless the right to withhold possession existed under the vendor's lien for purchase-money.

This could not be, for the balance of the purchase-money was proffered to the plaintiffs, and their declination to receive it is inconsistent with their right of lien. *Aldridge vs. Johnson*, 7 E. & B. 885. Lien cannot exist without sale. Here the lien is not set up as the objection, but it is maintained that the sale was not perfect.

We have already shown that the position is not tenable.

We also think that the contract in terms appointed Maule Bro. & Co. to take possession of this lumber upon its inspection, and the payment of freight and the balance of the purchase-money, or in case of the plaintiffs' refusal to receive it, the tender of it.

Why should they be required to pay the freight, except that they were entitled to the possession of the lumber? Their payment of freight is only consistent with their right to possess it.

The contract reserved no right for the plaintiffs to refuse to deliver the lumber, nor is silence on that point consistent with the right to do so, inasmuch as the lumber was not in their actual possession.

The rule of law is, that where personal property is on storage, out of the vendor's possession, the bill of sale with notice to the depository is constructive delivery of the property.

Linton vs. Butz, 7 B. 89; *Schomacker vs. Ely*, 12 H. 521; *Bissel vs. Steele*, 17 P. F. Smith, 448; *Pleasants vs. Pendleton*, 6 Randolph, 473; *Jones vs. Warren*, 12 Mass. 300; *Felton vs. Fuller*, 9 Foster, 121; *Plymouth Bank vs. Bank of Norfolk*, 10 Pick. 459; *Hilliard on Sales*, 105.

It follows hence, that the rule for a new trial must be discharged.

Rule discharged.

Thomas E. McElroy, Esq., for plaintiffs.

Thomas Hart, Jr., Esq., for defendants.

[Leg. Int., Vol. 29, p. 228.]

BROWNING vs. ARMSTRONG

1. The fact that the maker of a promissory note resides at a different place and in a different State from the place at which the note is dated does not relieve the holder from the duty of demanding payment of the maker at his residence; and his neglect to do so, or to use due diligence to do so, discharges the indorser.
2. Where the holder resided in that part of the city of Philadelphia known as the old city, and the indorser resided in Germantown: *Held*, that a notice of non-payment sent to the indorser through the United States mail, directed to him at Germantown, was sufficient.

Rule for a new trial. Opinion delivered *July 13, 1872*, by

THAYER, J.—In this case, which was tried before my brother Lynd, it appeared that the plaintiff was indorsee of a promissory note made by James Armstrong, Jr., to the order of the defendant and by him indorsed. The note was dated at Philadelphia. The Camden Bank held the note at its maturity and sent it to the Bank of North America in Philadelphia, for collection. The notary in whose hands it was placed for collection by the bank, inquired on the day of maturity between three and four o'clock P. M., of the plaintiff where the maker resided, and was informed that his place of business was at Blackwoodtown, New Jersey. In fact the maker had resided there for some years. The notary thereupon protested the note without any demand for payment on the maker, and without making the least effort to make such demand. On the same day he deposited a notice of non-payment in the post-office, addressed to the defendant at Germantown, which was his place of residence.

An indorser is discharged from responsibility if the holder neglects to present the note for payment to the maker at maturity, and to demand

payment, unless after using due diligence to make such demand he has failed to do so by reason of his inability to find the maker's residence. The old rule is still the rule—that the holder must demand the money or *do his endeavor* to demand it. *Lambert vs. Oakes*, 1 Lord Raymond, 443. It was contended by the plaintiff's counsel that inasmuch as the note in the present case was dated at Philadelphia a presumption arose that the maker resided there, and if that was not his place of residence, it was not the duty of the holder to seek the maker in another place, particularly if his place of residence was in another State. If the maker had resided at Philadelphia when the note was made, and had subsequently absconded or removed into another State, the plaintiff's case would have had a better foundation, for it would then have resembled *Magruder vs. The Bank of Washington*, 9 Wheaton, 661, and *Read vs. Morrison*, 2 W. & S. 401, although it was not decided in the latter case that the removal of the maker from one of the United States to another, would relieve the holder from the necessity of demanding payment if he knew the maker's residence. But there would seem to be no authority for the position that a holder of negotiable paper is excused from demanding payment of the party primarily liable because the note happens to be dated at a place which is not his residence at the time of drawing it. Such a doctrine would make the indorsers of such paper principals instead of sureties, and seriously impair its negotiability. It is a just inference from *Fisher vs. Evans*, 5 Binney, 541, that such is not the law. It was there held that the holder of a bill does not use due diligence to ascertain the residence of the drawer for the purpose of giving him notice of dishonor by looking for him at the place where the bill is dated if his residence is elsewhere. In that case the drawer's residence was at Philadelphia, and the bill was drawn and dated at Savannah, but that circumstance was held not to excuse a neglect to give him notice of non-payment at his residence in Philadelphia. The doctrine of *Fisher vs. Evans* was reaffirmed in *Filler vs. Morris*, 6 Wh. 406, in which case it was held that the fact that the bill was dated at Philadelphia, furnished no excuse for not giving notice to the drawers at Montgomery, Alabama, which was their place of residence. If the place of date is presumptive evidence of the residence, so as to excuse a demand of payment in any other place, it ought with equal reason be held to be presumptive evidence of residence for the purpose of notice. "I can find no such principle," says Tilghman, C. J., in *Fisher vs. Evans*, "as that for which the plaintiff in error contends, that the place where the bill is drawn must be taken to be the residence of the drawer." Nor was the opinion of that eminent judge in *Duncan vs. McCullough*, 4 S. & R. 481, at all at variance with the decision in *Fisher vs. Evans*. When he says in *Duncan vs. McCullough*, that "the notes being dated at Baltimore would raise a presumption that Baltimore was the drawer's place of residence," he speaks of a natural not a legal presumption—a presumption of fact, not of law, for he immediately adds, "Baltimore then was the place at which inquiry should have been made." But he says nothing which would warrant the inference that if the holder had inquired in Baltimore, and upon such inquiry had discovered the residence of the maker to be in another place, he would have been excused from making a demand at his residence. The indorser was in that case discharged because the holder had made

no efforts either at Baltimore or elsewhere to ascertain the residence of the maker and to demand payment of him. The utmost effect, it would seem, which can be given to the place of date, is, that in the absence of all knowledge of the maker's residence, it is proper for the holder to inquire there for information, and his doing so is perhaps some evidence of diligence to ascertain it.

That the holder of a promissory note is bound to use due diligence to make a demand of the maker, notwithstanding his residence is at a different place from that at which the note is dated, was directly decided in *Lightner vs. Will*, and *Park vs. Ingersoll*, 2 W. & S. 140. In that case, Waters, the maker of the note, resided at Chartier's creek, some miles from Pittsburgh, and the note was dated at Pittsburgh. The notary thought himself excused from demanding payment at the maker's residence because the note was dated at Pittsburg, and after diligent search for him there protested the note without a demand made. But the indorsers were held to be thereby discharged. To these cases may be added *Moore vs. Somerset*, 6 W. & S. 262, where the alleged presumption that the maker resides where the note is dated is treated with very little respect.

Does it make any difference that the maker's place of residence is in another State, especially when that fact is well known to the parties? The cases already referred to upon the subject of notice of non-payment show that it does not. Immediate notice of non-payment is quite as important to the indorser as a demand upon the maker, and the place of date cannot be said to be of any more significance in one case than in the other. It is a matter of constant occurrence that bills and notes are drawn in one place when the drawer or maker lives in another place. It would be a dangerous and injurious novelty to introduce into the commercial law of this country, that because the maker of a note resides in another State from that in which it is dated or made, no demand is to be made upon him for payment, and that the indorser is therefore to be called upon for payment without any resort to the maker. In New York the very point now before the court was decided in *Spies vs. Gilmore*, 1 Barb. S. C. R. 158, affirmed on appeal, 1 Comst. B. 321, in which case a note was made, dated and indorsed in the State of New York by persons whose place of residence was in Mexico, which was known to the payee and holder. It was held that a demand of payment of the maker and notice to the indorser were necessary to charge the indorser, and that the circumstance that the maker of a note resides in a foreign country affords no excuse to the holder for not following him with the note and demanding payment there so far as the indorser is concerned, unless the payee or holder has protected himself from the necessity of doing so by specifying some other place of payment in the body of the note. *Taylor vs. Snyder*, 3 Denio, 145, is to the same effect; in which case it was held that the dating of a promissory note at a particular place does not make that the place of payment, or authorize a demand to be made at that place for the purpose of charging an indorser.

Doubtless some things which were said by the learned judge who delivered the opinion of the court in *Pierce vs. Struthers*, 3 Casey, 252, are in conflict with the decisions which I have referred to; as, for example, when he says that "the law presumes the residence of the drawer from

the date, and therefore, prima facie, notice according to the date is sufficient." But these dicta were no part of the decision in *Pierce vs. Struthers*, or necessary to it, and they are opposed to the deliberate judgments pronounced in the cases already cited. The only point decided in *Pierce vs. Struthers* is, that where a bill of exchange is drawn upon and directed to a person in a particular place, and is accepted by him at that place, a demand at that place is sufficient to fix the drawer and indorsers. A decision which was reaffirmed in 6 Casey, 139, and 5 Wr. 215, and which accords with the well-settled law upon that subject. Chitty on Bills, 366, *et. cit.* in note *q*. And the reason is, that in such cases it is part of the contract that payment shall be made at a particular place, and therefore a demand at that place is sufficient. If it were otherwise, the rates upon bills of exchange could never be computed or regulated. It would destroy the negotiability of such instruments, if, when payment is agreed to be made at one place, the holder should be obliged to seek it in another place. Bills of exchange were invented as a safe and convenient method of transmitting money from one place to another, and it is an essential part of the contract that they are to be paid in the place upon which they are drawn. The same rule holds where a note is made payable in the body of it at a particular place. A demand at such place is sufficient. *Rahm vs. The Philadelphia Bank*, 1 Rawle, 335; *Jenks vs. The Doylestown Bank*, 4 W. & S. 505; *Wood vs. Kelso*, 3 Casey, 241. Although not always necessary. *Fuller vs. Bickley*, 2 W. & S. 458. But it must be obvious that the point upon which the present case turns is altogether a different point from that which was ruled in *Pierce vs. Struthers*. Here the note was not made payable at any particular place, and the cases already cited, and which have not been overruled, show that the holder is not excused from making demand of payment because the maker does not reside at the place where the note is dated, and where under such circumstances he does not use due diligence to find him; or where, knowing his residence to be in another place, he has made no demand upon him for payment.

In the case now before us, the notary ascertained the residence of the maker immediately upon making inquiry, but although it was within a few miles of this city, he took no steps whatever to demand payment. He did nothing. He demanded payment nowhere. If it be said that it was then too late in the day to go to the maker's residence, the question naturally arises, why did he not ascertain it sooner? The holder cannot be justified in neglecting to make the necessary inquiry for the maker's residence until the last minute of the day, and then to dispense with a demand, because there is not time. There are cases which hold that where, at the time a note falls due, the holder is at a place distant from the place of abode of the maker, a reasonable time will be allowed to make the demand. *Freeman vs. Boynton*, 7 Mass. Rep. 483; *Haddock vs. Murray*, 1 N. Hamp. 140; 3 Wend. 491. However this may be, it cannot be doubted that the indorser is discharged, where there has been neither demand nor diligence to make it. And that is this case. It is the duty of the holder to inform the notary of the residence of the drawer, and if unknown to the holder, he must inquire of those whose names are on the note, and if they do not know it, he must use due diligence to ascertain it. *Smith vs. Fisher*, 12 Harris, 224. The

notary's negligence in this respect was the negligence of the holder, whose agent he was, and upon the facts shown we think the jury ought to have been instructed that the indorser was discharged.

As to the second point, we are of opinion that notice of dishonor, sent through the post-office to the indorser at his residence in Germantown, was sufficient. Germantown, it is true, is within the corporate limits of Philadelphia, but it is equally true, that although it is an integral part of the municipality, it is a village seven miles distant from the old city in which the bank is situated, which held the note at maturity. It has a post-office, and the United States mail is carried thither as regularly as to any other town in the country. The post-office there is under the supervision and control of the postmaster of Philadelphia, who appoints the local agent in charge of it. Nevertheless, it may in all other respects be fairly regarded as a different post-town. Besides which, it was plainly intimated by the Supreme Court in *Shoemaker vs. Mechanics Bank*, 9 Smith, 79, although not expressly decided, that now that free delivery of letters is established and regulated by law, so as to secure a certain delivery according to their address, it is proper that the rule should be adopted which has long prevailed in England, that notice sent through the post-office by a regularly appointed carrier, to a person in the same place, is sufficient.

Rule absolute.

John C. Bullitt, Esq., for plaintiff.

George S. Selden and R. C. McMurtrie, Esqs., for defendant.

[Leg. Int., Vol. 29, p. 229.]

HORTER *et al.* vs. HARLAN.

1. A decree of the United States Circuit Court, restraining a party from proceeding in the State court, to collect a judgment against the bankrupt's estate, the judgment having been obtained upon a note drawn by the plaintiffs, on which said bankrupt was the last indorser, cannot prevent the plaintiff from proceeding against the defendant *ex delicto* in this court, on account of his fraudulent appropriation and embezzlement of the proceeds of said note.
2. The pendency of proceedings in bankruptcy, against the defendant, does not suspend proceedings against him in this court for fraud or embezzlement, such debts being expressly excepted from the operation of the Act of Congress.

Opinion delivered *July 13, 1872*, by

BRIGGS, J.—The affidavit upon which this warrant is issued charges, that about the 5th day of November, 1870, the plaintiffs intrusted their note for \$2750.16 with the defendant to get it discounted, and to hand to them the proceeds; and that he accordingly got it discounted, but instead of giving them the money, he appropriated it to his own use. The evidence adduced before me leaves no doubt of the truth of this allegation.

McBride's receipt to the plaintiffs and his affidavit show that the note was given to the defendant to be discounted for the plaintiffs. These documents, made and given about the time of the transaction, are sustained by McBride's testimony, wherein he says:

"Mr. Horter or myself, or both perhaps, asked Harlan, 'could he get a note discounted for Mr. Horter.' He replied, he thought he could get a note discounted in a few days after that, in the West Philadelphia

Bank, but would want the money himself; but the following week he thought he could get one discounted for Mr. Horter up in the country, at West Chester or Oxford, I do not remember which. Mr. Horter replied at the time, this would suit."

This conversation occurred about an hour before McBride handed the note to the defendant, and when he handed it to him, nothing further was said. The defendant's testimony upon this point substantially accords with McBride's, and yet he says he understood that he received this note in payment of a debt McBride owed him. McBride, however, says that he did not pay the note to the defendant for an antecedent or existing debt, and that both Horter and the defendant knew this. The defendant's letter of October 15, 1870, to the plaintiffs, is also antagonistic to such a conclusion.

The plaintiffs had frequently accommodated McBride with the use of their paper, and McBride stood in an intimate business relation with the defendant, and had upon two occasions before been instrumental in getting the defendant to procure the discount of the plaintiffs' notes for the plaintiffs' benefit. It was during the existence of these relations, that the note in question was placed into the defendant's hands. At this time, not a word was said about the plaintiffs furnishing a note to be discounted for the defendant's benefit. The plaintiffs were the parties who were seeking the advantage of the discount of their paper, and the defendant was the one whose agency was invoked to accomplish that result. In view of these facts, and the delivery of the note to the defendant within an hour after the foregoing arrangement, the conclusion to my mind is irresistible, that the defendant received the note to get it discounted for the plaintiffs, and did get it discounted, and appropriated the proceeds to his own use.

Nor do I think the degree of the Circuit Court of the United States, at the suit of Samuel B. Huey, the defendant's assignee in bankruptcy, against the West Philadelphia Bank and the plaintiffs, restraining them from issuing execution upon the judgment obtained by the bank against the bankrupt, relieves the defendant. The pleadings show that the bank obtained a judgment on the note against both the plaintiffs and the defendant, and that the plaintiffs paid the judgment thus obtained against them. Carrying the decree to its extremest extent, it does not, indeed it cannot, restrain the plaintiffs from proceeding against the defendant *ex delicto* in this court on account of his fraud; debts created by the fraud or embezzlement of the bankrupt are expressly excepted by the Act of Congress respecting bankrupts, and the exclusive jurisdiction of the courts in bankruptcy does not extend to such cases. *In re Winternitz*, 4 B. R. 127; *Sheppardson's Appeal*, 36 Conn. 23.

This view also disposes of the position assumed by the defendant's counsel, that the pendency of proceedings in bankruptcy against the defendant suspends all proceedings against him in this court. This is undoubtedly true, as to the subjects enumerated in the Act of Congress. But debts created by fraud or embezzlement being expressly excepted from the operation of the act, the position assumed cannot be maintained.

Being satisfied that the allegations of the complaint are substantiated,

it is ordered that the defendant be committed until he shall be discharged by law.

George Bull, Esq., for plaintiffs.

John C. Bullitt, Samuel Dickson and F. H. Cheyney, Esqs., for defendant.

[Leg. Int., Vol. 29, p. 188.]

HUDDERSON vs. PRIZER.

A party attending an equity cause before an examiner is privileged from the service of a summons.

Rule to set aside the service of the writ. Opinion delivered *June 10, 1872*, by

THAYER, J.—The defendant, while attending before an examiner in an equity case in which he was a party and a witness, was served with a summons by a sheriff's officer; the officer intruding himself into the examiner's office while the cause was proceeding and serving the writ in his presence. It is very clear that this was a contempt of the Court of Common Pleas, whose officer was interrupted in the discharge of his duties, a violation of the privilege of the defendant and an abuse of the process of this court. From the instance related by Lord Coke, in his Institutes, in which Henry of Harwood, in the twelfth year of Edward III., was fined and imprisoned for causing a citation to be served upon a defendant within the precincts of Westminster Hall, down to the present time, the salutary principle has been asserted in all countries governed by laws and institutions of English origin, that all persons who, in the discharge of their duty, are in attendance upon courts of justice, and in going to and returning therefrom, are exempt from the service of *mesne* process in civil cases. It is a privilege which extends alike to parties, witnesses, attorneys, jurors, and all others who are assisting in the administration of justice. It is alike the privilege of the person and the privilege of the court. It renders the administration of justice free and untrammelled, and protects from improper interference all who are concerned in it. Nor does this immunity extend alone to persons who are in the immediate presence of the judges of the courts of record. It extends to those also who are in attendance upon the subordinate tribunals and officers appointed by those courts to assist them in the discharge of their duties, to witnesses subpoenaed before commissioners: 1 Chit. Rep. 679; 3 B. & A. 252; 3 Aust. 941; 3 East, 189—a creditor attending commissioners of a bankrupt: 7 Ves. 312; 1 Ves. & B. 316—a party attending a reference under a rule of court: *Clark vs. Grant*, 2 Wend. 257—a witness before arbitrators: *Sandford vs. Chase*, 3 Cow. 381—a party attending execution of a writ of inquiry: 4 Moore, 34—a witness attending before a magistrate to have his deposition taken under a rule of court: *United States vs. Edme*, 9 Serg. & R. 147 or before a commissioner for the same purpose: *Holmes vs. Morgan*, 1 Phila. R. 217.

Nowhere has this privilege been more liberally interpreted or more strenuously enforced than in Pennsylvania. For a violation of it the Supreme Court of this State, in the *United States vs. Edme*, delivered a defendant from the custody of a United States marshal; and in a like case in the Circuit Court of the United States, Judge Washington dis-

charged a defendant from a writ issued by the Supreme Court of this State. *Hurst's Case*, 4 Dal. 387. Nor is there any difference as regards this privilege between writs of summons and writs of *capias*. The exemption extends to both alike. This was determined at a very early day: *Bolton vs. Martin*, 1 Dal. 296; and is well settled: *Hayes vs. Shields*, 2 Yeates, 222; *Miles vs. McCullough*, 1 Bin. 77. "The distinction," said the court, in *Hayes vs. Shields*, "between writs of summons and *capias* is not solid, and was overruled in *Bolton vs. Martin*. The party's attention to his own business in the suit depending is distracted by other objects, and he is subjected to the inconvenience of attending an action at a considerable distance from his own place of abode, contrary to the wise indulgence of the law."

In discharging the defendant from this action, we restore the rights of which he has been improperly deprived, and maintain the freedom of the courts.

Rule absolute.

Thomas J. Diehl, Esq., for plaintiff.

John J. Lewis, Esq., for defendant.

[Leg. Int., Vol. 29, p. 220.]

BENSON vs. MOLE.

A release of lien under seal, executed on a promise to pay the money, is void for failure of consideration, upon proof of the facts before the auditor.

Exceptions to auditor's report. Opinion delivered July 6, 1872, by MITCHELL, J.—Of the exceptions to this report, only those founded on the effect allowed by the auditor to the sealed releases need be specially noticed. The fund in court arose from the sale of two houses under proceedings on a mechanics' lien, and all the claimants who were reached in the distribution except one were mechanics' lien creditors. When the claims were presented to the auditor, releases under seal, by several of the claimants, were offered in evidence. It was then proposed by the claimants to avoid the effect of the release by proof that they were given without consideration. The auditor decided that in the absence of any allegation of fraud, the releases were binding without further consideration than that imported by the seal. "It was law at one time in Pennsylvania," he says, "that no consideration was necessary for the forgiving of a debt. *Wentz vs. De Haven*, 1 S. & R. 317. And in *Coe vs. Hutton*, 1 S. & R. 410, Yeates, J., said, 'one may release a debt without consideration, if he meant to do so. The party's intentions must be collected from the expressions he has made use of.' Although these cases have been greatly restrained and explained away (*Whitehill vs. Willson*, 3 Penn. 313, *Millen vs. Hemler*, 5 W. & S. 487), a careful search throughout the reports has convinced the auditor that there is no authority in Pennsylvania controverting the doctrine that a release under seal is good without consideration. *Gray vs. McCune*, 11 Har. 447. And where there is a seal, equity will not relieve the releasor merely on the ground of want of consideration. *Yard vs. Patton*, 1 Har. 285."

We agree entirely with the learned auditor in his statement of the law on this point, but the counsel for the claimants failed to direct his

attention to the distinction between *want* of consideration and *failure* of a consideration stipulated for at the time of the execution of the releases. More than a hundred years ago Chief Justice Allen said he had known it to be the practice for thirty-nine years then past to allow *failure* of consideration to be shown by a defendant in an action on a specialty. *Swift vs. Hawkins*, 1 Dall. 17. The rule (though not accurately stated in that case) is now familiar, and we think the facts reported bring some of the exceptions in the present proceeding within reach of its benefits. The three exceptions of Hillary & Bro. all amount to the same thing, that the auditor erred in disallowing their claim against one of the houses. These claimants executed releases of both houses on the faith of defendant's promise to bring them the money the next day. It was admitted that nothing had been paid to them by defendant, and the auditor found the consideration had failed. One of the releases was not under seal, and he therefore allowed the claim as to one house. We think that where the consideration failed, the seal made no difference in the rule applicable to the case, and that the claim should have been allowed as to both houses.

The first, third, and fourth exceptions of Wentz & Bro. also raise the same point, that the auditor held the sealed release to be conclusive. The auditor reports that "these claimants executed both these releases under seal. At the time they did so the defendant promised to pay them within a certain time, but did not do it. They never received anything on account of this claim." The finding of the auditor is not so explicit in this claim as it would have been had the matter been argued before him on the proper ground, but we take the report to be a finding that the defendant's promise to pay was the consideration for their execution of the releases, and that it entirely failed.

The exceptions of Hillary & Bro., and the first, third, and fourth exceptions of Wentz & Bro. are sustained, and all the others are dismissed. The report is referred back to the auditor to report a schedule of distribution in accordance with the views herein expressed.

Frank Wolfe and A. Thompson, Esqs., for the exceptants.

J. B. Gest Esq., contra.

[Leg. Int., Vol. 29, p. 164.]

COMMONWEALTH vs. DALY *et al.*

Under the acts of April 9, 1859, and April 2, 1822, regulating the commissions of auctioneers in the city of Philadelphia, such auctioneers, although commissioned for one year, are authorized to continue the business from year to year under the same commission, paying to the State Treasurer annually a like sum to that paid on obtaining the commission, and they are required to renew their bonds and sureties at the end of every three years. Where, therefore, such an auctioneer having given a bond with sureties conditioned for the faithful performance of his duties during the period he should act as auctioneer under the commission granted to him, continued to carry on the business of an auctioneer after the first year: *Held*, that his sureties were liable on their bond for a breach of his duty occurring after the first year and before the expiration of the three years.

Rule for a new trial. Opinion delivered May, 18, 1872, by

THAYER, J.—The action was upon an auctioneer's bond conditioned for the true and faithful performance of his duties as auctioneer, and that he would pay all duties and taxes which may become due to the State

"during the period he shall continue to act as an auctioneer under the commission that may be granted to him." The commission was dated July 17, 1868, and was "for the term of one year." The breaches assigned occurred after the expiration of the first year but within the period of three years. It was contended for the sureties that they were not responsible for any breach of duty on the part of the auctioneer occurring after the end of the first year. This position was not sustained by the court, and the plaintiff had a verdict. The question therefore is, whether under the acts of assembly regulating the licensing of auctioneers, their sureties are responsible for neglects of duty on their part which occur in the exercise of their business as auctioneers after the expiration of the year mentioned in the commission. The subject is chiefly regulated by the acts of April 9, 1859, and April 2, 1822, although there are several other acts containing provisions upon the same subject which are still in force.

It is quite clear that the act of 1859 repeals only so much of the act of 1822 as conflicts with the act of 1859, for this is expressly declared by the 12th section of the act of 1859. The two acts are to be construed together, and the provisions of both are to stand except where they are inconsistent. By both acts the commission is to be in terms for one year. But by the act of 1822, which prescribes the condition of the bond (section 2), it is declared that "for each and every *succeeding year*, during which the holder of any commission or license granted as aforesaid shall continue to use and exercise the business of an auctioneer, he shall pay or cause to be paid in advance to the State Treasurer a like sum to that which he paid on obtaining such commission." This language plainly implies that the license acquired by the commission may be continued indefinitely by the annual payment of the license fee required by the act. The effect of it is to enlarge the commission and extend the license upon the payment of the annual fees—and this without the formal issuing of a new commission. This construction seems a necessary result of the language used. It is further confirmed by the provision of the fourth section, which enacts that "at the end of every three years every person holding the commission of an auctioneer shall *renew* his bond and sureties."

A provision that a new bond shall be given at the end of every *three* years is altogether inconsistent with the supposition that the bond given when the commission issued should be only for one year. The result is, that the commissions of auctioneers in the city of Philadelphia, notwithstanding by the terms of the act they are to be *in form* for one year, continue in force so long as such auctioneers comply with the requirements of the law in respect to the annual payment of the license fee; and the responsibility of their sureties is limited to a period of three years.

There is no force in the objection that this makes the commission indefinite or perpetual in its duration. Let us not be frightened by the use of large words. Such a commission is nothing but a license to pursue a particular business upon the prescribed conditions. Every citizen of Pennsylvania has a right to such a license if he will pay for it and give the security required by law. The Governor has no discretion in the matter. He cannot refuse it to any citizen who will comply with the requirements of the law. It seems highly probable that the reason for

requiring a commission in the first instance instead of an ordinary license; was, that auctioneers are, with respect to the State, agents for the collection of the duty chargeable on all auction sales. They are to pay such duty to the State Treasurer, and are to account quarterly under oath to the Auditor-General for all sales made. It seems highly proper that persons engaged in a business which brings them into such relations with the State should obtain their license to carry it on from the chief executive officer of the State, and that it should be evidenced by its great seal. But the Legislature doubtless saw no good reason for compelling the persons engaged in this business to take out a fresh commission every year, and to subject them to the trouble and expense of so doing. They enacted, therefore, that the license granted by such a commission should continue from year to year at the will of the licensee, so long as he might comply with the requirements of the law and pay the annual license fee. The State and the public were protected by the provisions relating to security and penalties. The provision requiring that every person holding the commission of an auctioneer should renew his bond and surety at the end of every three years, shows conclusively that the bond and sureties given were to endure for that length of time. Nor is there anything in the condition of the bond in the present case which exonerates the sureties from responsibility for the three years. The condition is for the faithful performance of the duties of auctioneer by Thomas H. Martin "during the period he shall continue to act as an auctioneer under the commission that may be granted to him." It was entirely in accordance with the scheme of the law that the bond was taken in this form instead of for one year; but it is difficult to believe that if the intention had been to confine the operation of the security to one year it would not have been so nominated in the bond, and it is altogether impossible to reconcile such a construction with the provision for triennial bonds.

Thomas H. Martin was acting as a licensed auctioneer at the time of the breach of duty complained of, and he was acting under the commission which he had received, notwithstanding the fact that the commission, following the phraseology of the act of assembly, would appear on its surface, and without any reference to the law or the practice inaugurated under it, to be a commission for one year only. When read in the light of the law under which it was given it was a commission certain for one year, in consideration of the license fee which had been paid, and also a commission which might continue from year to year so long as the auctioneer should continue to pay the annual license fee and comply with the requisitions of the act. The three years at the end of which he would have been required to give a new bond not having expired, the responsibility of his sureties had not terminated. They were responsible for three years if their principal should so long continue in the business, and have no right to complain that the responsibility which they voluntarily assumed is now enforced.

Rule discharged.

MITCHELL, J., dissents.

Mayer Sulzberger and Thos. R. Elcock, Esqs., for plaintiffs.

Pierce Archer and Thos. J. Barger, Esqs., for defendants.

[Leg. Int., Vol. 29, p. 140.]

SCHLESSINGER vs. THE ADAMS EXPRESS COMPANY.

1. Where a common carrier applies to a judge of the Court of Common Pleas for an order of sale of goods in his possession to satisfy his lien, upon the ground that the places of residence of the owner and consignee are unknown (in pursuance of the act of December 14, 1863, P. L. 1864, Appendix, p. 1127), and such order is granted, it is his duty to expose the goods for public sale at auction. If he sells trunks or boxes, filled with valuable goods, as trunks or boxes the contents of which are unknown, without exhibiting the goods or stating what is in the trunks or boxes, so that the buyers cannot know what they are bidding for or buying, such a sale is contrary to the act of assembly and the order made under it, and is unlawful, and the carrier will be responsible to the owner for the value of the goods.
2. The plaintiff packed her trunks in New York in February, locked them and then came to Philadelphia to reside, leaving the trunks in the custody of a friend, but keeping the keys herself. In April, she employed the defendants to bring the trunks from New York, which they accordingly did. There being evidence to show that when they arrived in Philadelphia, they were locked and to all appearances in the same condition as when she left New York: *Held*, that it was properly left to the jury to say whether the things which were in them when she left New York were in them when they came into the possession of the defendants.
3. Representations and declarations made by the agent of a corporation in the course of the business intrusted to his particular care are binding upon the corporation, notwithstanding they produce evidence to show that he had no authority to make those declarations or representations. Persons dealing with the corporation by such an agent have a right to suppose that he has authority to speak for them relative to the business intrusted to his special care.

Rule for a new trial. Opinion delivered April 27, 1872, by

THAYER, J.—The case on the part of the plaintiff, Mrs. Schlessinger, was this. She had been residing in the city of New York. In 1871 she removed to Philadelphia. When she came to Philadelphia she left in New York under the care of Madame Lamporte, with whom she had boarded, four large trunks filled with a large number of articles, many of which, according to her testimony and that of her son, were of great value. The trunks, according to the plaintiff's statement, had been packed by herself and son about the end of February. They were securely locked and she retained the keys in her own possession. In April, 1871, she employed the defendants to bring these trunks from New York to Philadelphia. They arrived in Philadelphia on the 27th April, 1871. On the 28th of April, Mrs. Schlessinger called at the defendants' office. The trunks were then shown to her by the clerk who had charge of the undelivered freight and unclaimed packages. She told him that she was then boarding and had not room for them in her boarding-house, and asked if they would keep them on storage. He replied that they were not allowed to take storage but that they would keep the trunks for her. She asked him how long they would keep them, and he replied, "one year and no longer." The clerk contradicted this statement. According to his version of the conversation, she told him that she was boarding and had not room for the trunks at her boarding-house, that she hoped to go to housekeeping in the course of two or three weeks and that she would call again and let him know where the trunks should be delivered. Mrs. Schlessinger's statement of what occurred is corroborated by her son, who desiring to get a book out of one of the trunks went to the office of the company about two months after his mother's interview with the clerk. He was accom-

panied on that occasion by his mother. According to his testimony his mother then asked whether they could have access to the trunks. Permission was given and the son was taken into the basement by the porter, took out the volume which he wanted, locked the trunk and returned up-stairs. He then asked his mother in French to ask the clerk again, in his presence, whether they would keep the trunks. He replied, "that they would keep them for one year and no longer." It did not appear that the defendants then objected that the trunks had been left for two months in their possession, or that they requested the plaintiff to take them away. The clerk, however, testified that the plaintiff again promised to send word where the trunks should be delivered. The plaintiff's son also testified that when in the basement he examined the other trunks to see if they were in good order, and whether the locks had given way, and that he found them all, so far as was indicated by their external appearance, in good condition.

On the 30th of December, 1870, these trunks, without any knowledge of the fact on the part of the owner, were sold at auction by the defendants as unclaimed packages. They were sold as four trunks, the contents of which were unknown, each trunk being sold separately, none of them being opened, none of the contents being exhibited or stated to the bidders, they being informed that the contents were unknown and being in absolute ignorance of the contents of the trunks. Under these circumstances one of the trunks was sold for \$9, one for \$9.50, one for \$8.50, and one for \$5.50. Although the trunks were sold as "contents unknown," in point of fact the defendants' agents had gone into the cellar where they were deposited, opened them and examined them a month before the sale. They made, however, no inventory of the things. "They looked," they said, "to see if there were any valuables, but discovered none." They described the contents as books and clothing. The freight for which they were sold amounted to \$8. According to the plaintiff's statement she had offered to pay the freight when the trunks arrived, and was told that she might pay when she should take the trunks away. The plaintiff claimed to recover in this action the value of her trunks and their contents, and she had a verdict for \$6000.

The defendants' case was that they had never promised to keep the trunks, that the clerk of undelivered freight and unclaimed packages had no authority to make any such promise, that the plaintiff had said she would inform them where they should be sent, that she had neglected to do so, and that the trunks were sold as unclaimed packages under an order of the Court of Common Pleas, which authorized the sale. They also insisted that there was no sufficient evidence of the contents of the trunks when they came into their possession.

The questions of fact were all left to the jury. The defendants complain that it was left to the jury to determine whether the things which Mrs. Schlessinger and her son testified were in the trunks when they packed them in the end of February in New York were actually in the trunks when they came into the possession of the defendants in April. The plaintiff and her son testified that when the trunks were left in New York they were securely locked and the keys remained in her possession. The son, Rudolph Schlessinger, testified that when he opened one of the trunks in Philadelphia, after they had been in the possession

of the defendants for two months he found everything in the same condition as when he and his mother had left it in New York, and that the other trunks which he examined externally at the same time, but which he did not open, appeared to be in the same condition. In view of this evidence we do not see how the judge could have taken the cause from the jury. It was left to them with this instruction: "The jury are to determine from such evidence as they have whether the trunks contained in point of fact the things which Mrs. Schlessinger says were in them in January and February, 1869, when she packed them and left them in the care of Madame Lamporte in New York. I leave it to you to say whether such evidence is satisfactory. It is to be received, of course, with caution, and it is to be carefully examined into, but nevertheless, it is proper for you to consider it." It appears to us that the defendants have no just cause to complain of such an instruction.

Whether the defendants had promised the plaintiff to keep the trunks for a year, was left to the jury upon the evidence, and they were instructed that if they had so promised they had no right to sell them before the expiration of the period during which they had promised to keep them. This proposition was not controverted by the defendants, but they adduced evidence to show that the clerk of undelivered freight had no right to make such a promise. And they insisted that in the absence of any authority to give such an assurance, the company was not bound by it. This position we regard as wholly untenable. The representations and declarations of an agent of a corporation stand upon the same footing with those of an agent of an individual; and the general principle that such representations and declarations made in the course of the performance of the particular duty with which the agent is intrusted, are binding upon the principal, is too well settled to admit of the least doubt. In *Tanner vs. Oil Creek R. R. Co.*, 3 Smith, 411, such a declaration made by a freight agent was enforced against a corporation under circumstances quite analogous to those of the present case. There, as here, the promise was made by a freight agent. There, as here, it was urged that the agent had no authority to make such promise, and testimony was given to prove it, but it was held by the Supreme Court that "freight agents are competent to bind the company by their representations and promises made in the course of the business intrusted to their particular care." And the court below was reversed for a contrary instruction. It is quite clear that there would be no safety for the public in dealing with corporations, who act entirely by their agents, if a rule so just, necessary and wholesome as this were not sustained.

Upon the subject of the sale of the trunks, the jury were instructed that a sale conducted in the manner in which this sale was admitted by the defendant's witnesses to have been conducted, was not such a sale as was contemplated by the order of the Court of Common Pleas or authorized by the act of assembly under which that order was made.

The first section of the act of assembly passed December 14, 1863 (P. L. of 1864, Appendix, p. 1127), entitled, "An act relating to the liens of common carriers and others," declares that in all cases in which commission merchants, factors, and all common carriers or other persons shall have a lien upon any goods, wares, merchandise, or other property,

for the costs or expenses of carriage, storage or labor bestowed thereon, if the owner or consignee shall fail, or neglect or refuse to pay the amount of such charges within sixty days after demand thereof made personally upon such owner or consignee, it shall be lawful for any such commission merchant, factor, common carrier, or other person having such lien, after the expiration of said period of sixty days to *expose* such goods, wares, merchandise or other property to sale at public auction, and to sell the same *or so much thereof as shall be sufficient to discharge said lien*, together with costs of sale and advertising." The second section of the act authorizes any judge of the Court of Common Pleas, upon the application of any of the persons or corporations having a lien upon goods, wares, merchandise or other property (as mentioned in the first section), verified by affidavit, and setting forth that the places of residence of the owner and consignee of any such goods, wares, merchandise or property are unknown, or that the goods are of a perishable nature, to make an order authorizing the sale of such goods, wares, merchandise or other property, upon such terms as to notice as the nature of the case may admit of, and to such judge should seem meet. The third section of the act declares that the residue of moneys arising from any such sales after deducting the amount of the lien and costs of sale, shall be held subject to the order of the owner or owners of such property.

On the 19th of November, 1870, the defendants presented a petition to the Court of Common Pleas representing that they had in their possession divers parcels of goods for delivery, and that the places of residence of the consignees were unknown to them, and praying for an order of sale. Among these goods were the four trunks of the plaintiff. On the same day a judge of the Court of Common Pleas made an order directing the defendants to make sale of the said goods, wares and merchandise, at auction, such sale being first advertised three times in a Philadelphia newspaper, and by six printed handbills. Under this order the sale was made on the 30th of December, in the manner which has been already described.

The proposition that the terms of a judicial order for the sale of the goods, wares and merchandise of an absent owner, at public auction, would be satisfied by selling trunks or boxes locked up so that the contents could not possibly be known—the contents being declared by the sellers to be unknown, although they had previously broken them open and examined them—is so preposterous in itself, so entirely opposed to every consideration of common sense and fair play, that it was not attempted to be maintained by the defendants' counsel on the argument of the rule for a new trial. It is not necessary to enter into any argument to refute such a proposition. The act of assembly under which the defendants proceeded requires the goods, wares and merchandise to be *exposed* for sale at public auction.

It is sufficient to say that the act of assembly under which the defendants proceeded, although it authorizes the goods, wares and merchandise in the hands of commission merchants, factors or common carriers, under the circumstances referred to, to be exposed for sale at public auction, gives no warrant for such a proceeding as this, which in its character partook rather of the features of a lottery than a sale. It is

impossible to say that goods are, in any legal sense, exposed to public sale, which are neither exposed, shown nor described in any manner whatever, either by words, printed characters or signs, and in regard to the very nature and existence of which the bidders are kept in profound ignorance. The sale authorized by the act, and ordered by the court, was a very different thing from that. It was a sale at which the buyers should at least know what was to be sold, and should be able to form some opinion of the value of that for which they were to bid. The act is not regardless of the rights of the absent owner, for it directs the residue of the moneys, arising from the sale after discharging the lien, to be held subject to the order of the owner. But what residue could be expected for the plaintiff from a sale conducted in such a manner as this? How could there be any honest competition among buyers when no one knew for what he was bidding? The act contemplates a public sale in the usual manner where the things to be sold are described and exhibited to the purchasers. The defendants substituted for it an illegal and most unjustifiable proceeding, which, it is easy to see, might be used for the most fraudulent and dishonest purposes, and which actually resulted in great loss to the plaintiff, her large trunks, filled with valuable and rare articles, having been knocked down for prices ranging from \$5 to \$9 a piece. There was a count in trover in the declaration, and we think the disposition which was made of the trunks was a wrongful conversion of the plaintiff's property.

The defendants cannot protect themselves under the act of assembly, and the order of court when they have not complied with either. It is a sufficient answer to say, you have not done that which you were authorized to do. You have done that which you ought not to have done, and have left undone that which you ought to have done.

Several points were submitted to the court by the defendant's counsel upon the trial, which were answered in the charge to the jury.

The first point was, that if the defendants are liable, they are liable only as gratuitous bailees without hire, and the plaintiff must prove neglect and want of ordinary care, in order to establish liability on the part of the defendants. In answer to which the jury were instructed that if the defendants offered to deliver the property after it came to their hands, and were to keep it for the plaintiff without compensation, the plaintiff must show either neglect or misconduct on the part of the defendants before she could recover. They were also told that, in the opinion of the court, it was not so much a question of negligence as it was a question whether the defendants had disposed of the trunks in an improper manner. It was not pretended that the goods had been casually lost, but that the defendants had improperly disposed of them. This was the very point of the case, and to it we think the attention of the jury was properly directed.

The second point was, that there was no evidence of neglect or want of ordinary care, and we entertain no doubt that the court was right in refusing so to charge.

The third point was, that if the evidence showed that Mr. Granger, the clerk of the undelivered freight and unclaimed packages, had no authority to contract or promise to keep the trunks for one year, then such promise would not bind the defendants. We think the

point was properly refused for the reasons which have been already given.

The fourth point related to the defence that the goods were sold under an order of court, and was answered in the general charge, and we think correctly answered.

The fifth, sixth, seventh, eighth and tenth points were properly refused.

The ninth point was, that if the defendants took ordinary care of the trunks, the plaintiff must prove fraud or negligence against them in order to recover, and that there is no proof of such fraud or negligence.

In answer to which the jury were told by the court, that the plaintiff must prove negligence or misconduct, that there was no evidence of fraud. It would have been very improper for the court to have taken the case from the jury by telling them that there was no evidence of negligence, after instructing them that the sale of the trunks by the defendants, owing to the manner in which it was conducted, was irregular and unlawful.

It only remains to notice the eleventh reason assigned for a new trial, which is, that the damages are excessive: upon this subject the jury were advised to proceed with great caution in assessing the damages, if they should find a verdict for the plaintiff, to bear in mind the natural bias which might possibly influence the plaintiff and her son in valuing the property which they had lost; that the value of the things was not to be affected by any considerations which were merely personal to the plaintiff, or to be settled by any fanciful or sentimental ideas of value. They were reminded that it was their duty in determining the question of value to be guided by practical rules of common sense, and to affix such value only to the property as it really and intrinsically possessed, such a value as would be represented by the prices which it would bring at a fair sale. Upon a careful and critical review of the whole evidence, we are unable to say that the jury have disregarded these instructions, or that they have transcended the limits which their duty assigned to their functions. It was a matter to be determined by the exercise of their best judgment. We are not convinced that it was not so determined, or that the result which they arrived at was against the weight of the evidence or the justice of the case.

Rule discharged.

M. Hampton Todd and *Wm. L. Hirst*, Esqs., for plaintiff.

David Webster, Esq., for defendants.

[Leg. Int., Vol. 29, p. 140.]

THE SHERMAN BUILDING ASSOCIATION *vs.* ROCK.

Where the return of loans made by mutual saving fund, loan, or building associations, regulated by the act of April 12, 1859 (P. L. 544), is anticipated by borrowers, they are only entitled to a return of one-eighth of the premium for every whole year anticipated. They are not entitled to a proportionate return for a fraction of a year.

Case stated. Opinion delivered April 27, 1872, by

THAYER, J.—By the provisions of the act of April 12, 1859, relative to the formation and incorporation of mutual saving fund, loan or building associations, the officers of such companies are authorized at stated meetings to offer for loan the money then in the treasury, if it

exceeds \$200; and the stockholder who shall bid the highest premium shall be entitled to receive a loan of \$200 or more for each share of stock held by him. It is also provided (by section 5) that a borrower may repay a loan at any time, "and in case of the repayment thereof before the expiration of the eighth year after the organization of the corporation, there shall be refunded to such borrower one-eighth of the premium paid for every year of the said eight years then unexpired."

The question raised by the case stated is, whether a borrower repaying a loan before the expiration of the eighth year is entitled to a return of a proportionate part of the premium for the *fraction* of a year. It must be obvious that if the association is obliged to make an allowance for every fraction of the time which is anticipated it will lose some part of the premium, for some time must necessarily elapse before the money can be loaned again. It can only be loaned at stated meetings. There may not be an immediate demand for money, and some time is necessarily consumed in determining the sufficiency of the security offered. The act takes no notice of fractions of a year. It is to be supposed it would have done so if the intention had been to require a return of the premium proportioned to such fraction. This pregnant omission and the loss and inconvenience arising from a construction which would enlarge the provision beyond its express terms lead us to the conclusion that the defendant is only entitled to a return of the one-eighth of the premium for the year anticipated, and not to any allowance for the fractional part of another year which he claims in addition.

Judgment for plaintiffs for \$2956.32.

Jos. C. Ferguson, Esq., for plaintiffs.

John H. Sloan, Esq., for defendant.

[Leg. Int., Vol. 29, p. 132.]

DILL vs. McCLOSKEY.

The building of a wall upon another's land is a continuing trespass, as long as the wall is unlawfully maintained there, and where a recovery has been had in an action of trespass for the erection of it, a new action of trespass may be brought for its maintenance, and the former recovery and satisfaction will be no defence as to any damages accruing after the issue of the writ in such action.

This was a rule for a new trial. Opinion delivered April 20, 1872, by MITCHELL, J.—This was an action of trespass *quare clausum fregit*. Plaintiff and defendant were owners of adjoining lots on a street in Manayunk, at a point where the grade of the hill is quite steep. At the side of the defendant's house, an opening had been made by excavating the plaintiff's land to the width of four or five feet, and extending from the front line on the street to about the rear of the defendant's main building. The bank caused by this excavation was supported by a wall on plaintiff's land; the purpose of the opening being apparently to give access of light and air to the wall of defendant's house to keep it dry.

No complaint was made by plaintiff as to this condition of the properties, which had existed for a considerable period. About 1868, however, McCloskey, defendant's decedent, made an excavation partly on his own land and partly on plaintiff's, running back from the old opening to the rear of his own lot, being in effect an extension of the old opening at a slight angle or elbow, and converting the opening into a

passage-way or alley from the street to the back of his house. To support the bank of earth thus left exposed, he built a wall as a continuation of the old wall, and, like it, entirely on plaintiff's land.

For this trespass an action was brought by plaintiff in this court on December term, 1868, and on the calling of the jury by agreement of counsel a verdict was taken for plaintiff for nominal damages.

The wall not having been taken down, however, this second action of trespass was brought for its maintenance. Defendant pleaded not guilty, and at the trial filed an additional plea of former recovery. The jury were instructed that allowing the wall to remain on plaintiff's land was a trespass *de die in diem*, and that the former recovery was not a bar as to any damages accruing since the issue of the writ in that action. This is the instruction complained of.

The case of *Holmes vs. Wilson*, 10 Ad. & E. 273, is precisely in point. In that case the trustees of a turnpike company had built buttresses to support the road on the land of A, who thereupon brought trespass for the erection. Defendants paid £25 into court, which plaintiff accepted in satisfaction. Subsequently A brought another action for breaking and entering his close and keeping and continuing thereon the said buttresses. There was no evidence of any fresh entry or of any act of defendants other than the failure to remove the buttresses. The court held that trespass was the proper form of action, Lord Denman, C. J., saying: "The former and the present action are for different trespasses. The former was for erecting the buttresses. This action is for continuing the buttresses so erected. The continued use of the buttresses for the support of the road under such circumstances was a fresh trespass."

It was strenuously urged at the trial in the present case that McCloskey could not be held liable for the continuance of the wall because he could not enter to take it down without committing a second trespass, and that plaintiff might take it down himself. In *Brent vs. Haddon*, Cro. Jac. 555, plaintiff was the owner of a meadow which was overflowed by the raising of a mill dam by one Quarles, who subsequently let the mill to defendant. After verdict upon not guilty pleaded, and found for plaintiff, it was moved in arrest of judgment "that the request to abate it was made to the lessee where it ought to have been to the lessor who had the freehold; for the lessee hath not any authority to abate it, being done in the time of his lessor, and it should be waste in him; nor was it any nuisance erected by him. *Sed non allocatur*; for the continuance is a nuisance by him, against whom the action well lies. Wherefore it was adjudged for the plaintiff."

And in *Thompson vs. Gibson et al.*, 7 Mees. & Wels. 456, where the precise point was made, Baron Parke, in delivering judgment, said: "It was argued that the lessee was not without remedy; he might abate the nuisance; but that affords no compensation in damages, and may in some cases be an expensive remedy. . . . It was also said that the defendants could not now remove the nuisance themselves, without being guilty of a trespass to the corporation, and that it would be hard to make them liable. But that is a consequence of their own original wrong; and they cannot be permitted to excuse themselves from paying damages for the injury it causes, by showing their inability to remove it, without exposing themselves to another action."

Upon these authorities, which we should not have thought it necessary to cite, except for the earnestness with which counsel contested the case, we are of opinion that the instruction to the jury was right.

There is, however, another reason assigned for a new trial, which remains to be disposed of.

This was an action brought originally against one McCloskey, who died pending the suit, and whose administratrix, the present defendant, was thereupon substituted on the record. After the jury was sworn and the trial was commenced, the defendant's counsel was summoned to meet a special engagement in the Supreme Court, and was obliged to leave the conduct of the defence in the hands of fresh counsel, with such instructions as could be imparted on the instant or gathered from the defendant during the progress of the trial. Under these circumstances, probably by an inadvertency of plaintiff's counsel, Isaac S. Dill was called as a witness and allowed to testify without objection to matters occurring during the lifetime of the decedent, neither the court nor the defendant's counsel observing that he was the plaintiff, and therefore not a competent witness. This fact, however, having been developed at a subsequent stage of the trial, the jury were directed to disregard Dill's testimony and to erase it as far as possible from their memories. We are by no means clear that the introduction of this testimony, followed by a positive direction of the court to entirely disregard it, did any substantial injury to the defendant, but as it is reasonably certain that objection would have been made, and the witness rejected, had the defendant's counsel, who was familiar with the facts of the case, been present, we are of opinion that the defendant should have an opportunity to present the case to the jury upon the proper evidence only, and on this ground the rule for a new trial is made absolute.

[Leg. Int., Vol. 29, p. 132.]

GRAMLICH *vs.* RAILROAD COMPANY.

Where there is no dispute about the facts, alleged to constitute contributing negligence, the court may say as a question of law whether they amount to negligence or not.

The act by plaintiff's servant of driving a loaded cart across the track of defendants, at a point where the ground was soft and heavy, and without any planking or other means of surmounting the rails, which projected above the ground, in consequence of which it became fast, and was struck by defendants' train, though the plaintiff had a right to cross there, was in itself negligence and barred recovery.

Opinion delivered *April 20, 1872*, by

MITCHELL, J.—This was an action against the railroad company for injuries to the plaintiff's horse and cart by a collision with the cars on the Germantown Branch Railroad.

The accident took place at what was called "Dauphin Street Cut," about three squares south of where the railroad crosses Broad street. The plaintiff's team and men were engaged in carting earth across the railroad from the eastern side for the purpose of opening and grading Dauphin street to the west of the railroad, where the lot was below the proper grade. No street had ever been opened there for travel. The part west of the railroad went down into the lot and Cohocksink creek below, and did not afford any outlet. It was not curbed or paved; the

plaintiff and his men were the only ones using it. The ground across the railroad and between the tracks was very soft and muddy, the T rails projected above the ground, and plaintiff's servant attempted to drive a loaded cart across without placing planks or other material to enable him to surmount the rails. The consequence was that his cart became fast in the mud between the up and down tracks.

The plaintiff's servant, Fitzpatrick, who was driving the cart at the time, testified that his cart was stuck about twenty minutes, but the evidence on the part of defendant showed that this was a very reckless statement, as several witnesses testified to the fact that another train had passed over the track about five minutes ahead of this one.

The track at this point curves to the westward, and the view is also obstructed by the fence of a large brewery or beer vault on the west. How far a cart on the track at Dauphin street cut could be seen by those on board a train approaching from the northwest, was a point upon which there was considerable conflict of testimony at the trial.

At the close of the testimony, the defendant's counsel presented the following point:

Eighth.—If the jury believe that the ground between the railroad tracks at Dauphin street was very heavy, that the rails projected above the surface of the ground, and that there were no planks to enable the cart to surmount the rails, and that the plaintiff's servant drove a heavily-laden cart over such a place and thereby became fast in the mud while still on the track, then he was guilty of negligence and cannot recover.

This the judge declined to affirm, and left the question to the jury to say, whether there was negligence or not on the part of plaintiff.

That negligence is usually a question for the jury, and that where there is conflicting evidence as to any facts which may constitute contributory negligence, the question is always and necessarily for the jury, are well-settled principles; but where there is no dispute about the facts, it is equally well settled that the court may say as a question of law, whether they amount to negligence or not. And it is the duty of the court to so declare it where the facts show such an obvious disregard of duty and safety as to amount to misconduct. *West Chester & Phila. R. R. Co. vs. McElwee*, 17 P. F. Smith, 311.

The facts in the present case which relate to the plaintiff's negligence are undisputed in any material point. Allowing a horse and cart to remain stuck for twenty minutes, as the driver testified, on a track, where some sixty or more trains were known to pass daily, without any effort to unload the cart, or failing to accomplish this, at least to unhitch the horse and get him out of danger, might of itself fairly be held to be such negligence as would prevent plaintiff's recovery. But passing this, we are of opinion that the act of driving a loaded cart on the track without any planking or other means of surmounting the rails, was in itself negligence. Those who cross a railroad track, even at a public crossing, are bound to do so with a reasonable allowance of time for contingencies that may delay and hinder their passage. In this case the rails projected a considerable distance above the ground, and the ground itself between the tracks was very soft and heavy. There was no public crossing at this point, and therefore no possible obligation

on the part of the railroad company to provide planking or other conveniences for surmounting the rails. Under these circumstances, if the plaintiff had any right at all to haul dirt across the track, it was to be exercised with the utmost care to avoid any interruption to the railroad travel. It is an obligation of duty that cannot be too strictly insisted upon, that persons using a railroad track shall do so with constant regard to the safety, not only of themselves, but of others who may be endangered by their carelessness. If the train in this case had been going at its full speed, or if the body of the cart had been stuck on the western track, instead of between the eastern and western, the consequences of the collision might have been not only the breaking of the cart, but also the breaking of the cars, or throwing them from the track, with maiming or killing of employes or passengers on the train. Against the happening of such accidents there should be not only the vigilance of the railroad company, but of all those who in any manner have occasion to use the track.

We are of opinion, therefore, that the defendant's eighth point should have been affirmed without qualification, and the rule for new trial is made absolute.

Geo. W. Dedrick, Esq., for plaintiff.

Thomas Hart, Jr., Esq., for defendants

[Leg. Int., Vol. 29, p. 100.]

**THE MUTUAL FIRE INSURANCE Co. of Germantown and its vicinity,
vs. ANN ELIZA STOKES, Executrix of Wyndham H. Stokes, dec'd.***

The title of a statute may under some circumstances be decisive of its intent and construction.

To give force and effect to an act of incorporation it must be accepted by the company incorporated. But it is not necessary to show a written instrument, or even a vote of acceptance. It may be inferred from the acts of the company, as from the election of officers, the holding of meetings, the adoption of by-laws, or the actual use of the powers or privileges granted. An acceptance by the directors, acquiesced in by the company, is sufficient.

Case stated. Opinion delivered *March 25, 1872, by*

THAYER, J.—The plaintiffs have brought a *scire facias* on a mortgage for \$2500, executed by Wyndham H. Stokes, November 30, 1855, to the "Mutual Fire Insurance Company of Germantown and its vicinity." The plaintiffs were incorporated by an act of assembly, approved April 15, 1843. The existence of the corporation was limited by its charter to a period of twenty years. At an annual meeting of the corporation, held September 5, 1858, the officers of the company were directed to make application to the next Legislature for a renewal of the charter, and to suggest such alterations as they might find to be necessary. An act of assembly was, at their instance, passed February 10, 1859, entitled "An act to amend and extend the charter of the Mutual Fire Insurance Company of Germantown and its vicinity." This act in its *enacting clauses* does not expressly extend the existence of the corporation chartered in 1843, or allude to it in any manner, but it incorporates the same persons, by the same corporate name, and with the same powers.

It is substantially a re-enactment of the act of 1843. Some slight changes are made, but almost the whole act is in the very words of the

* Affirmed in S. C.

act of 1843; and it is without limitation as to time; Wyndham H. Stokes was a director and secretary of the corporation under both acts.

In the latter capacity he called the annual meeting of September 5, 1858, at which the officers were directed to apply for a renewal of the charter. In the same capacity he attested the minutes of a stated meeting of the directors (of whom he was one) held April 16, 1859, at which the amended charter was read and approved. He was one of the corporators named in both acts. He was also treasurer, and at an annual meeting of the company, held September 7, 1859, he presented an account of receipts and disbursements in which he claimed and was allowed a credit of \$100 for expenses in obtaining the new charter. There is no minute showing a formal acceptance of the new charter by the members of the corporation; but it claims to have acted under it since its passage, and is now acting under it. Mr. Stokes paid the interest upon the mortgage until 1870, when he died.

Two points are made by the counsel for the executrix: 1st. That the title of the act of February 10, 1859, is no part of the act itself, and that inasmuch as the enacting clauses do not in express terms continue the corporation created by the act of April 15, 1843, or make any reference thereto, but apparently create another and new corporation by the same name, the plaintiffs are dead in law, their existence having terminated by efflux of time, in pursuance of the limitation contained in the act of 1843. And so they cannot maintain this action. 2d. It is contended that, granting that the new charter was intended for the benefit of the old company, it does not appear that its members ever accepted its provisions, and that without such acceptance they cannot claim its benefits.

On the first point it must be obvious that if we are permitted to look at the title of the act of 1859, in order to ascertain its intent, and to construe the act by the intent there so clearly manifested, there is no room whatever for argument. To construe the act by its title is to end the defendant's case on that point.

The title and the preamble of an act stand upon the same footing, and are said both in the ancient and modern cases to be no part of the act itself. The meaning of which plainly is, that they are not to override or control the enacting clauses. A plain enactment is not to be set aside by the title or preamble. But it is equally old and good law that where the construction is at all doubtful, we may look both to the title and preamble to assist us in arriving at the intention of the law-makers. "The rehearsal or preamble of the statute," says Lord Coke, "is a good means to find out the meaning of the statute, and as it were, a key to open the understanding thereof;" Co. Litt. 79, a; upon which Mr. Hargrave observes: "Lord Coke's manner of expressing himself on the operation of the preamble in the construction of statutes is very observable. Instead of saying *generally* that the preamble should control the enacting clauses, or of limiting precisely how far it shall have that effect, which would have been attempting to make a line where one cannot be drawn, he cautiously says, that it is a *good mean* to find out the intention." Chief Justice Dyer, in Plowden, 369, uses the same expression, where he says of the preamble, that "it is a key to open the minds of the makers of the act and the mischief which they intended to redress." See also, Tindal, C. J., in the Sussex Peerage, 11 Cl. & Fin. 143, and for the same reason

great respect is to be paid to the title in construing an ambiguous law. *Heard vs. Baskerville*, Hobart, 232. To discover the meaning and intent of the law-makers is the touchstone of the interpretation of statutes; and this meaning is to be discovered "from the whole act taken together, its title, preamble and enacting clause." *Kirk vs. Dean*, 2 Bin. 348. In ascertaining the intention nothing is to be rejected from which aid can be derived, and therefore the title may claim a degree of notice and is entitled to its share of consideration. *Deddrick vs. Wood*, 3 Har. 12. It is unnecessary to heap up cases upon a point so well established. The whole law, ancient and modern, is concisely and luminously exhibited in the two learned judgments pronounced by Sharswood, J., in *Cochran vs. The Library Co.*, 6 Phila. Reports, 492, and *Yeager vs. Weaver*, 14 P. F. Smith, 425.

Among the cases which have been cited three may be particularly noticed as furnishing illustrations of the effect to be given to the title of a statute. In *Deddrick vs. Wood*, 3 Har. 9, the title played a conspicuous part in extending the operation of the enacting clause. In *Cochran vs. The Library Co.*, 6 Phila. Reports, 492, it was equally potential in restraining it. While the rule that it shall not overrule it contrary to its plain command is illustrated with equal force in *Yeager vs. Weaver*, 14 P. F. Smith, 425.

In the present case, if we do not look at the title, a latent ambiguity would seem to lurk in the enacting clauses of the act of 1859, arising out of the fact that it incorporates the same persons, by the same corporate name, in the same place, for the same purposes, with the same powers, and almost in the same words as those mentioned and used in the act of 1843. One of the aids for the interpretation of laws is the comparison of the law with other laws, made by the same legislature, that have some affinity with the subject, or that expressly relate to the same point. 1 Bl. Com. 60. Comparing these two acts, at what conclusion are we to arrive? Did the Legislature intend to erect two corporations, in the same place, exactly alike in every particular, and consisting of the same corporators? If so, it is, at the least, a legal curiosity. When we look at the title of the act, all is made perfectly clear. The second act is there declared to be an amendment and extension of the first. With such a flood of light cast upon the subject by the Legislature itself, are we to grope about in the dark for their meaning? To shut our eyes to the title under such circumstances would be to sacrifice the plainest considerations of common sense; and common sense and the law, as was observed by Sir Thomas Plumer in *Colpoys vs. Colpoys*, 1 Jac. R. 465, are seldom at variance.

Upon the second point the case is also with the plaintiffs. To complete the creation of a corporation, something more than a grant is unquestionably necessary. To give it vitality, it must be accepted. The government cannot incorporate persons for their benefit, without the consent of such persons. It has been held, however, that grants beneficial to corporations may be presumed to have been accepted. *Charles River Bridge vs. Warren Bridge*, 7 Pick. R. 344.

It is never indispensable to show a written instrument or even a vote of acceptance. It may be inferred from the acts of the persons interested, as for example, from the exercise of corporate powers under the act, the

election of officers, the holding of meetings, the adoption of by-laws, and other corporate acts. An acceptance by the directors acquiesced in by the company has been held to be sufficient. *Lin. and Ken. Bank vs. Richardson*, 1 Greenl. R. 70. The cases are numerous in which it has been held that the actual use of the powers and privileges given furnish in the absence of an authenticated record of acceptance sufficient evidence of it. A minority cannot bind a majority by acceptance. *Commonwealth vs. Jarrett*, 7 S. & R. 460. But where the members of a company have in combination pursued a uniform and harmonious course of conduct which is consistent with no other hypothesis than an acceptance of the charter, the strongest inference of acceptance arises. Hear the company at its annual meeting directed their officers to apply for a renewal of the charter. It was obtained. The board of directors accepted the renewed charter after it had been granted. And the company, at its annual meeting, approved the expenditure of money for expenses which had been incurred in obtaining it. It is fairly to be inferred from all the facts contained in the case stated, that the company, without the least dissent, accepted the renewed charter, and have been acting under it from April, 1859, to the present time.

Judgment for the plaintiffs.

Samuel S. Hollingsworth and George W. Biddle, Esqs., for plaintiffs.
David W. Sellers, Esq., for defendant.

[Leg. Int., Vol. 29, p. 92.]

JACOB J. UBEROTH vs. THE UNION NATIONAL BANK.

A surviving partner who has become lunatic is, notwithstanding his lunacy, entitled by his committee to the custody and control of the partnership property, and may sue for the recovery of debts due to the partnership.
 In such suit the lunatic and his committee must both be joined as plaintiffs.

Rule for judgment. Opinion delivered *March 18, 1872*, by

THAYER, J.—This action is brought to recover a balance due by the defendants to the late firm of Halbach & Sieger. The affidavit of defence discloses the facts that Halbach is deceased, and that Sieger, the surviving partner, is a lunatic. It is objected that the committee of the latter cannot maintain an action to recover the partnership debts. If the relation of a surviving partner to the property and assets of the partnership was simply that of a trustee, doubtless the objection would be well taken, for when a trustee becomes a lunatic a court of equity will appoint a new one in his stead. But a surviving partner is not only a trustee for the personal representatives of his deceased partner. He has a right of property in the partnership effects, which entitles him to their possession and control. If he is under a disability, his right is to be exercised by the person who is appointed by law to manage his estate. He resembles, as to this, an infant, who must act by his guardian or next friend. By the act of 13th of June, 1836, the committee is charged with the management of his real and personal estate, and we are of opinion that this includes the control of the assets which belong to him as surviving partner.

The committee, however, cannot maintain an action for the lunatic's property in his own name *alone*. The lunatic and the committee must

both join in the action, the latter to manage the interests of one who is disabled to protect himself, and the lunatic because he may recover his understanding, and then is to have the management and disposal of his own estate. *Beal vs. Coon*, 2 Watts, 184. Upon the plaintiff making the proper amendment and satisfying us that the committee has given the security required by the 15th section of the act of 13th June, 1836, the rule for judgment will be made absolute.

Thomas J. Diehl, Esq., for plaintiff.

Charles Gilpin, Esq., for defendant.

[Leg. Int., Vol. 29, p. 92.]

CITY TO USE OF MOONEY vs. THE COTTAGE COMPANY.*

1. The owner of a square of ground is entitled to an allowance of but fifty feet, on a claim for constructing a sewer on the shorter front of said lot.
2. The claim may be filed against the whole depth of the lot, when it is unimproved.

Sci. fa. sur municipal claim for the construction of a sewer. Opinion delivered March 16, 1872, by

LYND, J.—The grounds of defence set up in the affidavit of defence are:

1. That the contractor Mooney agreed with the city of Philadelphia to do the work for \$2.55 a linear foot, that the defendants should be charged at one-half that sum only, to wit, \$1.27½, and that the claim has been filed for \$1.50. This objection would not be good even if the power of the councils of the city to fix the rates and charges for sewer constructions were limited to the price paid to the contractor; for the cost of the construction across intersections would, even under such a limitation, be properly assessed upon the property-holder, which would increase the assessment against him from ten to twelve and one-half per cent. But no such limitation is imposed; the language of the act of March 30, 1866 (*City Digest*, 310), is: "And hereafter, all the said charges and rates shall be fixed from time to time by ordinance of councils." Under this authority the city would certainly be justified in fixing such a charge as would cover not merely the contract cost of the intersections, but the deductions upon corner lots and all expenses properly incurred in the sewer construction account, including a proportion of the expenses of maintaining the highway and survey departments, both of which gave attention to various stages of the work. *Sellers vs. The City*, 6 Phila. Rep. 253.

2. That councils, by ordinance of May 12th, 1866, fixed the assessment or charges against property owners for the construction of culverts at \$1.25 per foot of front; but it is not stated that, at the time of the construction of the sewer in question, the charge made in the claim was not authorized by any ordinance then existing. In fact, the affidavit states that the ordinance of 1866 was then in full force, "*except so far as it applies to the charge to be made against the property owners*;" and the defendant is left, as to the charge, as though the ordinance of 1856 had not been mentioned. If the supplemental ordinance be not set out, we may assume that it is omitted because it does not help the defendant. There is nothing, therefore, to overcome the *prima facies* of the claim itself, to wit, that the sum of \$1.50 a foot has been "*duly assessed*" against the defendant's property.

* Affirmed in S. C.

(*Mem.*—The ordinance of February 16, 1869, Ord's 1869, page 46, fixes the charge at \$1.50.)

3. That defendant has not been allowed the deductions to which he is entitled under the following provisions of the ordinance of 1866: "On all corner lots an allowance shall be made of one-third the length of one of their fronts, such allowance to be *always and only on the street or highway having the longest front*. . . . And in case where a full block is *unimproved*, the depth of lot for computing the allowance shall be taken as half the length of the block; but in no case shall the allowance exceed fifty feet on a corner lot."

The defendant is the owner of the entire block of ground between Montgomery and Berks, Twenty-fourth and Twenty-fifth streets, the length of fronts being on each of the first-named streets about four hundred feet, and on the last-named streets five hundred feet each. The sewer in question is laid along Montgomery street; and he claims that he is entitled to a deduction of one hundred feet, instead of fifty feet, which appears in the claim to have been allowed to him. Inasmuch as it is not stated in the affidavit that the block is improved, we may assume that it remains in its natural or unimproved condition; and the depth of the lots on Montgomery street is therefore to be estimated at "one-half the length of the block," i. e., two hundred and fifty feet. The defendant, then, has two corner lots on Montgomery street, each having a front of two hundred feet, and each extending in depth—the one along Twenty-fourth street, and the other along Twenty-fifth street—two hundred and fifty feet; and inasmuch as the allowance shall be "always and only on the street having the *longest front*," the defendant must claim the "ordained" allowance, when the sewers shall be laid along Twenty-fourth and Twenty-fifth streets.

(*Mem.*—For brevity we have stated the dimensions of defendant's lot as though its southwestern corner had not been cut off by Ridge avenue. Of this he cannot complain.)

It must not be overlooked that these deductions are *ex gratia*, and, therefore, the reasonableness of the conditions upon which they are allowed are not and cannot be assailed by the property owners.

4. That the claim is filed against the entire block of ground for work done upon only one of the streets. We can find nothing in the acts of assembly, authorizing the city to file claims for the recovery of the cost of street improvements made in front of unimproved lots, to prevent her from including the entire depth of the lot, even should that extend through the whole block to another street.

5. There is nothing in the alleged defect of preliminary notice to the defendant before the filing of the claim. The city solicitor signed the notice, and it was duly served upon the defendant. That it was also signed by the counsel for the "use" plaintiff, and contained a direction to pay the amount of the assessment to the latter, cannot be excepted to by the defendant.

The city solicitor may designate an agent to whom such payment may be made, and the receipt of such agent is a valid acquittance—which is all that the property owner needs, and all that he can require.

Rule absolute.

Henry C. Terry, Esq., for plaintiff.

J. Howard Gendell and E. Spencer Miller, Esqs., for defendant.

[Leg. Int., Vol. 30, p. 4.]

NEIDE vs. PENNYPACKER.

An assignment of mortgage being recorded under the act of April 9th, 1849, is notice to subsequent purchasers.

Neide purchased a mortgage from Fox, who was acting as agent under letter of attorney from the mortgagee. Fox was a conveyancer and was usually employed by Neide in such matters. Neide had his assignment recorded and then left it and the mortgage in the hands of Fox to keep for him. Fox fraudulently claiming to still act under the letter of attorney from the mortgagee, assigned and delivered the mortgage to Pepper and absconded with the proceeds: *Sicmble*—The act of Neide in leaving the mortgage and letter of attorney in Fox's hands, was not, under the circumstances, such negligence as forfeited his title or postponed it to Pepper's.

Exception to auditor's report. Opinion delivered *September 28, 1872*, by

MITCHELL, J.—Two claimants appearing for a mortgage, the mortgagor after suit brought, paid the money into court, and by consent of all parties an auditor was appointed to report which of the claimants was legally entitled to the fund.

The facts as reported by the auditor are these: The mortgagee left his mortgage and a letter of attorney to sell it in the hands of Raimond D. Fox, a conveyancer in the city of Philadelphia. Fox, as attorney in fact of the mortgagee, sold the mortgage to Neide, the plaintiff, who had the assignment to him recorded, and then handed all the papers back to Fox to keep for him in his fire-proof. Fox was at that time a conveyancer of good standing, and Neide had left in his charge similar papers in other transactions, both before and after this.

Subsequently, Fox fraudulently claiming to still act under the letter of attorney from the mortgagee, sold and delivered the mortgage to Pepper, and absconded with the proceeds.

The argument for Pepper is, that he was a *bona fide* purchaser for value without notice of the previous assignment to Neide, and that the latter had been guilty of gross negligence in leaving the mortgage and the letter of attorney from the mortgagee in the hands of Fox, thus enabling him to commit the fraud.

Two questions thus arise in this case: first, whether the recording of the assignment to Neide was notice to Pepper? and second, if not, was there such gross negligence on the part of Neide, as must postpone his claim to that of Pepper?

In *Mott vs. Clark*, 9 Barr, 399, Judge Rogers, following the dictum of Judge Kennedy, in *Craft vs. Webster*, 4 Rawle, 241, stated the law positively, that an assignee of a mortgage is not bound to record his assignment. Subsequently, in *Philips vs. Bank of Lewistown*, 6 Harris, 401, the Supreme Court decided that the assignment of a mortgage was so far within the recording act of 1715, that when recorded a certified copy of it is evidence. As it was not necessary for the decision of that case, Judge Lewis, in delivering the opinion of the court, avoided expressly overruling *Mott vs. Clark*, and limited the decision to the single point of the admissibility of a certified copy, but it is impossible to reconcile the argument by which he reaches that conclusion, with the validity of the decision in *Mott vs. Clark*.

So far, then, as regards the act of 1715, though there has been no ex-

press decision that under it an assignment of a mortgage may be recorded, so as to be notice to subsequent purchasers, yet, taking the latest expression of the Supreme Court on the subject, we might so decide without disregarding any binding authority, or any clearly indicated opinion of that court. We are not required, however, to do this. *Craft vs. Webster* was decided in 1833; *Mott vs. Clark*, in 1848; and *Philips vs. Bank*, though decided in 1852, was a decision on the admissibility of a certified copy of a record made in 1848. By the act of April 9, 1849, sec. 14, P. L. 547, it was enacted that "all assignments of mortgages. . . may be recorded in the office for recording of deeds in the county in which the mortgage assigned. . . may be, or shall have been recorded; and the record of such instrument, or a duly certified copy thereof, shall be as good evidence as the original assignment," etc. This act is so far without judicial construction, unless in a case in our own court presently to be noticed. It is significant that this act followed within a year the decision in *Mott vs. Clark*, and also that the language used, "may be recorded," is the exact language of the acts of 1715; of April 15, 1828, 10 Sm. 249; of March 14, 1846, sec. 1, P. L. 124; of April 26, 1850, sec. 24, P. L. 581; and of April 26, 1854, sec. 1, P. L. 501; and that in nearly all of our recording acts, the grant of authority to record is immediately followed, as in the act of 1849, by a provision, that certified copies shall be admissible in evidence.

We should have little difficulty in deciding this case upon this point, were it not for our own decision in *Goff vs. Denny*, 2 Phila. 275, which the learned auditor in this case considered a binding authority upon him, controlling the result at which he would otherwise have arrived. That was a *scire facias sur mortgage*, to which the terre tenant filed an affidavit of defence, alleging that he was a purchaser at sheriff's sale, and that the mortgage had been merged and extinguished by a conveyance of the land by the mortgagor to the mortgagee. It was admitted, however, that prior to this conveyance, the mortgagee had assigned the mortgage, and it was clear, therefore, that no merger had taken place. The contention of the terre tenant really was, that inasmuch as the records showed a conveyance of the land by the mortgagor to the mortgagee, he as a purchaser at sheriff's sale was entitled to rely on the prima facie presumption of merger, and that the plaintiff's omission to record his assignment was such gross negligence, that it would bar his title as against a purchaser at sheriff's sale, who thought he was buying the land free of the mortgage. This is the point really decided by that case, and the expression of the former learned President of this court, "that the assignee was not bound to record the assignment is a point too well settled to be now shaken," must be taken in connection with the case really in his mind. His brief dismissal of the point with a reference to *Mott vs. Clark* indicates that the act of 1849 was not present to this thought, even if the case arose under it, a fact as to which the report gives no information.

We do not, therefore, regard this case as a controlling authority.

Construing the act of 1849, therefore, by the settled construction of others almost identical in language, and looking at its intent as a part of our whole system of recording, we are of opinion that an assignment of a mortgage, when recorded under its provisions, is notice to all subsequent assignees.

This is, of course, decisive in the plaintiff's favor, for having put his assignment on record, Pepper must be held to have had notice of it, and, therefore, can claim no superior equity. We may remark, however, on the second point, that the majority of the court are not convinced that, under the circumstances, Neide was guilty of such negligence as would forfeit his title, or postpone it to Pepper's, even had the latter been a purchaser without notice.

Exception sustained, and the balance of the fund in court, after deducting expenses and fees, awarded to Carroll Neide, the plaintiff in the execution.

W. M. Lansdale, Esq., for exception.

W. B. Robins, Esq., contra.

[Leg. Int., Vol. 30, p. 4.]

HARRIS vs. THE WESTERN UNION TELEGRAPH COMPANY.

1. Actual notice of regulation that telegraph company will not be liable for error in message, unless repeated, must be proved to excuse negligence.
2. Whether the receiver of a telegram could be bound by such a rule discussed.

Opinion delivered *December 28, 1872*, by

MITCHELL, J.—This is an action on the case against the telegraph company for negligence.

On the trial plaintiff proved the receipt by him from defendant of a despatch written upon a printed form, as follows:

"Western Union Telegraph Company.

"The rules of this company require that all messages received for transmission shall be written on the message blanks of the company, under and subject to the conditions printed thereon, which conditions have been agreed to by the sender of the following message:

"GALLIPOLIS, O., Nov. 12, 1869.

"To GEO. F. HARRIS, Philadelphia.

"Send five thousand (5000) one x twenty-four and a-half (24½) paper sacks.

"H. W. & A. L. LANGLEY."

The original despatch, as written by the sender, was then read in evidence. It was for only 500 sacks, and was written upon a printed form or blank containing among others the usual condition as to non-liability of the company for error in messages unless repeated.

Plaintiff testified to the making of 5000 sacks, the refusal of his customer to take more than the 500 ordered, and the loss on a resale of the 4500 thrown on his hands. He then, with a view of affirmatively proving negligence, called several witnesses, who testified as experts that the mistake of five thousand for five hundred both in the written numbers and the figures was not likely to occur from the ordinary and unavoidable accidents of telegraphy. Plaintiff then closed.

The question was reserved, whether plaintiff could recover without proof of the repetition of the message, and defendant called witnesses to prove that such a mistake might occur from the difficulties inherent in the art of telegraphy, and that there was no negligence in fact on its

part. The case went to the jury on the question of negligence, and they found a verdict for plaintiff.

This is now a rule for a new trial, and a motion by defendant for judgment *non obstante veredicto*.

It will be seen from this statement of facts, that this case differs essentially from *Passmore vs. Telegraph Company*, which was argued at the same time. That was an action by the sender of the message, who was conceded to have had notice of the regulation as to the repeating of messages, and whose rights arose under and were limited by the contract. This action is by the receiver of the message, and is in tort.

Two questions arose in this case: First, was there sufficient notice brought home to plaintiff of the regulation as to repetition of messages? Secondly, if so, was the plaintiff in this action bound by such notice?

Upon the first point we are of opinion that the notice was not sufficient. The defendant delivered to plaintiff a wrong message, and the jury have found that the error was caused by the defendant's negligence. The defendant, therefore, is in the position of a wrongdoer, and a notice, to excuse him, must be so full, clear and explicit, that it would be negligence in the plaintiff to disregard it. The notice proved was only a notice that there were regulations of the company, and that they had been agreed to by the sender of the message. Not the slightest specification is given of the nature of the regulations, nor any caution to the receiver of the message that they might be important for him to examine. We cannot say that there was anything in such a notice that put the plaintiff upon inquiry or action, at his peril.

As the first point is decisive in plaintiff's favor, we are not called upon to decide the second. But we may say that, treating this action as purely in tort for misfeasance, it would seem upon principle that the plaintiff could not be bound by such notice; and such appears to be the opinion of the Supreme Court in *New York and Western Telegraph Company vs. Dryburgh*, 11 Casey, 303, where Woodward, J., says, this company "charge fifty per cent. advance upon the usual price of transmission, where the sender demands that the message be repeated back to the first operator, and Le Roy did not pay it. If it be granted that, in consequence of his not purchasing this security against mistakes, he could not hold the company liable, it does not follow that Dryburgh cannot. He did not know whether the message had been repeated back to Le Roy or not."

It may very well be that the regulation as to repetition of messages will become so universal in the practice of telegraphy, that it will be considered to be known, constructively at least, to all persons sending or receiving messages, and that it will be held negligence in any person to act upon any important telegram without having it repeated. But such custom is not in evidence in this case, and it is not for this court to lead the way in such decision. After very full consideration, we are unable to distinguish this from Dryburgh's case, which is a binding authority in this State. The rule for a new trial must, therefore, be discharged, and judgment entered for the plaintiff on the verdict.

J. Quincy Hunsicker, Esq., for plaintiff.

Geo. L. Crawford, Esq., and Hon. Benjamin Harris Brewster, for defendant.

[Leg. Int., Vol. 30, p. 5.]

MAYER vs. GIMBEL.

A plea of defendant's bankruptcy should conclude with a verification.

This was an action of assumpsit on book account and notes. Defendant pleaded that after the accruing of the alleged causes of action he was adjudged a bankrupt, and was discharged from all debts or claims provable against his estate, *and of this he put himself upon the country.*

Plaintiff demurred to this plea, and assigned for cause of demurrer that it should have concluded with a verification.

Michael Arnold, Jr., Esq., for demurrer

M. Hampton Todd, Esq., contra.

Opinion delivered *December 28th, 1872, by*

MITCHELL, J.—It appears to be settled in English practice that a plea of discharge in bankruptcy shall conclude to the country, and this is supposed to result from the language of the English bankrupt act, or from a long continued usage of the profession. *Sheen vs. Garrett*, 6 Bing. 686. [19 E. C. L. R.]

This, however, is an anomaly, and there is nothing in our bankrupt act to require us to adopt it. The plea introduces new matter in confession and avoidance of plaintiff's claim, and ought to conclude with a verification. The case of *Patrick vs. Brown*, 7 Phila. 143, has been cited as a decision of this court sustaining the present form of plea, but we do not so regard it. That case purposely left the question open for future settlement, and decided that a plea of *plaintiff's* bankruptcy should conclude with a verification. We think a plea of defendant's bankruptcy should conclude in the same way. Plaintiff can then reply, and if defendant thinks the replication sets up matter inadmissible under the bankrupt act, he can raise the question clearly by a demurrer.

Demurrer sustained, with leave to the defendant to amend.

[Leg. Int., Vol. 30, p. 36.]

PASSMORE vs. THE WESTERN UNION TELEGRAPH COMPANY.

1. A regulation that a telegraph company will not be responsible for the correctness of messages unless repeated, is not so far contrary to private interest or the public good, as to justify a court of justice in pronouncing it void.
2. As to the time when a contract becomes binding, by letter or telegram, discussed.

Rule for a new trial and motion for judgment on points reserved.
Opinion delivered *January 25, 1873, by*

HARE, P. J.—This is an action against the Western Union Telegraph Company, to recover damages for a mistake committed by their servants in the transmission of a telegraphic message from Parkersburg, in West Virginia, to Philadelphia. The telegram as originally written by the plaintiff was as follows:

“PARKERSBURG, *April 14, 1865.*

“To P. Edwards, 423 Walnut street, Philadelphia.

“I hold the Tibb's tract for you. All will be right.”

Unfortunately, through some unexplained mistake or accident, an *s* was substituted for an *h*, so that the message when delivered in this city read, "I *sold* the Tibb's tract," etc. Edwards thereupon broke off the contract into which he had entered for the purchase of the land. The mistake was not discovered until the 2d or 3d of May, when the plaintiff came to Philadelphia, and had an interview with Edwards, who said that, supposing the telegram to be correct, he had made other arrangements.

The jury found a verdict for the plaintiff subject to the opinion of the court on the following points:

1. Whether the defendants are liable in this case, the plaintiff not having insured the message nor directed it to be repeated, and

2. That the form in which the telegram was transmitted by the defendants and received by Edwards, did not discharge Edwards from his liability as a purchaser under his contract with the plaintiff, and therefore that the damages sustained by the plaintiff were not a necessary or legal consequence of the default of the telegraph company.

It being agreed that judgment should be entered for the defendants if the court in banc were of opinion with them on either point.

The first point grows out of the terms and conditions prescribed by the company for the receipt and transmission of all messages. These were, *inter alia*:

"In order to guard against and correct as much as possible some of the errors arising from atmospheric and other causes appertaining to telegraphy, every important message should be REPEATED, by being sent back from the station at which it is to be received to the station from which it is originally sent. Half the usual price will be charged for repeating the message, and while this company in good faith will endeavor to send messages correctly and promptly, it will not be responsible for errors or delays in the transmission or delivery, nor for the non-delivery of REPEATED MESSAGES beyond TWO HUNDRED times the sum paid for sending the message, unless a special agreement for insurance be made in writing, and the amount of risk specified on this agreement and paid for at the time of sending the message. Nor will the company be responsible for any error or delay in the transmission or delivery, or for the non-delivery of an UNREPEATED message, beyond the amount paid for sending the same, unless in like manner specially insured, and amount of risks stated hereon, and paid for at the time."

If this regulation is valid, there is obviously an end of the plaintiff's case. It is conceded that he knew of the rule, and did not require the message to be repeated. He cannot, therefore, make the defendants answerable in damages consistently with the terms to which he tacitly agreed. It is a general principle that a man who seeks to enforce a contract shall not recover more than the contract gives. It is for him to consider, in entering into the obligation, what shall be the limit of the liability on the other side. If he assents to a provision that the opposite party shall not be answerable in a given case, or unless certain conditions are fulfilled, he cannot rely on the disadvantageous result of the bargain as a reason for relief.

This consideration might be conclusive, if the action were *ex contractu*, or founded solely on the agreement between the plaintiff and defendants.

Such, however, is not the case. It is an action *ex delicto* for the breach of duty which the defendants owe to every man, to receive the messages which he may wish to send, and transmit them to their destination. This obligation was anterior to the contract, and is not necessarily susceptible of being modified by it. Having its foundation in a rule of law, it cannot be varied or restricted, except in subordination to the principles on which the rule depends. The maxim *quilibet potest renunciare juri pro se inducto*, does not apply when the right in question is conferred on the individual with a view to his protection and for the common good.

The plaintiff calls for the application of this doctrine to the case in hand. The condition against liability for unrepeatd messages is, in his eyes, one which the defendants could not legally impose. It is, as he contends, virtually a stipulation for immunity against the consequences of their own negligence, and therefore invalid.

If such be the nature of the regulation, it cannot operate as a defence. The defendants are public agents, and as such bound to the exact diligence which is the condition precedent of all faithful service. Their charter was not conferred upon them merely as a means whereby gain might accrue without the risk incident to individual responsibility. It is a great and beneficial franchise confided to their hands for the better attainment of an object in which the community at large are interested. They are, therefore, not less than a railway company or a corporation organized to supply gas or water, under an obligation to exercise their peculiar function in a way to attain the end proposed, and must respond in damages to every one who is injured by a want of due care on their part, or on that of the agents whom they employ. This, as the case of *The Telegraph Co. vs. Dryburgh*, 35 Penna. 298, indicates, is true, not only as it regards those who contract with them, but of third persons, who having entered into no relation of contract, are yet injured by their negligence.

The fundamental truth of the plaintiff's contention is therefore undeniable; but like most truths, it is limited by other and collateral principles. A railway, telegraph or other company charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence, but they may prescribe rules calculated to insure safety, and diminish the loss in the event of accident, and declare that if these are not observed, the injured party shall be considered as in default, and precluded by the doctrine of contributory negligence. The rule must, however, be such, as that reason, which is said to be the life of the law, can approve; or at the least, such as it need not condemn. By no device can a body corporate avoid liability for fraud, for wilful wrong, or for the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right with full knowledge that mischief may ensue. Nor, as I am inclined to think, will any stipulation against liability be valid, which has the pecuniary interest of the corporation as its sole object, and takes a safeguard from the public without giving anything in return. But a rule—which, in marking out a path plain and easily accessible, as that in which the company guarantees that every one shall be secure, declares that if any man prefers to walk outside of it, they will accompany him, will do their

best to secure and protect him, but will not be insurers, will not consent to be responsible for accidents arising from fortuitous and unexpected causes, or even from a want of care and watchfulness on the part of their agents—may be a reasonable rule, and as such, upheld by the courts.

Applying this test to the case in hand, does the evidence disclose any sufficient ground for overruling a defence which is *prima facie* valid? The burden of proof is on the plaintiff. It is for him to show in what respect a regulation which he tacitly accepted is so far hostile to the interest of the community, or of that portion of it which uses telegraphy as a means of communication, that the law should not suffer it to stand. Unless this is so clear as to be legally indisputable, the judiciary should obviously refrain from interfering with the contract as framed by the parties, and refer the subject to the Legislature, who can at any time regulate the whole by statute.

We are fully aware of the importance of the question, and have no desire to relax the just measure of accountability in cases of this description. Telegraphy, like the other powerful instruments which science has placed at the disposal of man, is capable of being a source of injury instead of benefit. That the intelligence which it conveys is prompt will serve no good purpose, if mistakes occur during the process of transmission. The difficulty of avoiding them is, notwithstanding, greater than might at first appear. The function of the telegraph differs from that of the post-office in this, that while the latter is not concerned with the contents of the missive, and merely agrees to forward it to its address, the former undertakes the much more difficult task of transcribing a message written according to one method of notation, in characters which are entirely different, with all the liability to error necessarily incident to such a process. Nor is this all. The telegraph operator is separated by a distance of many miles from the paper on which he writes, so that his eye cannot discern and correct the mistakes committed by his hand. It was also contended during the argument, that the electric fluid which is used as the medium of communication is liable to perturbations arising from thunder-storms, and other natural causes. It is, therefore, obvious, that entire accuracy cannot always be obtained by the greatest care, and that the only method of avoiding error is to compare the copy with the original, or in other words, that the operator to whom the message is sent should telegraph it back to the station whence it came.

So far the inquiry is plain; but here a question of some difficulty presents itself. Should every message be repeated, or only those which are of sufficient importance to make such a precaution requisite? In answering this question it must be remembered that the repetition of a message necessarily involves delay and expense. The mail may transmit any number of letters simultaneously, but a telegram has exclusive possession of the wires during its passage over the line. While one message is repeated, others are delayed, which may at times be of serious consequence. There is, moreover, an increase of cost, which, though trivial in each instance, would be formidable in the aggregate, and necessarily augment the rate of charging in a ratio which has been roughly calculated at one-half. Such must be the result, if every one who wishes to engage rooms at a hotel or put a question of friendly interest must submit to the expense and possible delay of repetition.

On the other hand, the convenience of the opposite course is not less manifest. Instead of passing every message twice over the line, those only are to be repeated which from their importance demand peculiar care. And as the company cannot know what telegrams fall within this category, the question is referred to the person chiefly interested. Obviously he who sends a communication is best qualified to judge whether it should be returned for correction. If he asks the company to repeat the message, and they fail to comply, they will clearly be answerable for any injury that may result from the omission. If he does not make such a request he may well be taken to have acquiesced in the conditions which they prescribe, and at all events cannot object to the want of a precaution he has virtually waived. It is not a just ground of complaint that the power to choose is coupled with an obligation to pay an additional sum to cover the cost of repetition. If it were not, the company would in all probability be called on to repeat every message, with the inevitable effect of putting the public to an increased expense, without any corresponding gain.

We are, therefore, inclined to think that the regulation in question, or at least so much of it as has been considered in this opinion, is well calculated to reconcile the economy and despatch which the mass of the community principally desire, with the security against accident which each individual is entitled to demand. But we limit ourselves by saying that it is not so far contrary to private interest or the public good as to justify a court of justice in pronouncing it invalid.

We have not arrived at this conclusion without a just diffidence arising from the novelty of the subject and the want of any controlling authority in this State. But it is satisfactory to know that the principles set forth above are sustained by the judgment of the Supreme Court of Massachusetts, in *Ellis vs. The Telegraph Co.*, 13 Allen, 226; and also by that rendered in *Camp vs. The Telegraph Co.*, 2 Metcalf, Ky., 164.

We do not think it requisite to notice the second point, beyond saying that it presents a nice question, about which the books do not agree. See *Harris's Case*, Law Reports, 7 Chan. Appeals, 587; and the *British and American Telegraph Co. vs. Colson*, Law Reports, 6 Ex. 108. The fair deduction from the authorities seems to be, that although an offer made through the post-office becomes binding as soon as the assent of the person to whom it is addressed is signified by mailing a reply, the contract is still subject to this condition, that the letter of acceptance shall reach its destination; and will fail if the opposite party does not receive notice within a reasonable time in that or some other way. The principle is the same, when a telegram is altered in passing over the line, and misleads a purchaser. We do not, however, express any opinion on this head, and leave it for the consideration of the court above. In deciding that the company is not answerable for unrepeatable messages, we have in effect disposed of the whole controversy, and judgment is consequently entered for the defendants on the points reserved.

Judgment for defendants.

J. Cooke Longstreth, Esq., for plaintiff.

George L. Crawford, Esq., and *Hon. Benjamin Harris Brewster*, for defendants.

[Leg. Int., Vol. 30, p. 36.]

PRYOR vs. VALER.

Plaintiff, while repairing a public bridge, placed planks in such a position as to be thrown down by a passing vehicle; defendant in driving across the bridge threw them down and injured plaintiff: *Held*, not liable.

Rule for a new trial. Opinion delivered *January 25, 1873*, by .

HARE, P. J.—This is an action to recover damages for an injury alleged to have been occasioned by the defendant's negligence. The case as disclosed at the trial is as follows: A bridge over the Schuylkill which had been closed for repairs was again thrown open to the public. The ceiling proved to be too low, and the plaintiff with two other workmen was employed to raise it. They found it necessary to erect a stage or scaffolding, and accordingly laid planks across the rafters, at such a height from the flooring that an ordinary sized wagon could barely pass beneath. It was consequently impossible for a vehicle of more than ordinary height to cross the bridge without dislodging the planks. The plaintiff and his fellows got upon this insecure superstructure and went to work, but neither took the obvious precaution of stretching a rope across the bridge, nor requested the toll-gate keeper to warn passengers of the danger. That which might have been foreseen occurred. After several carriages had gone over safely, the defendant approached in a covered wagon. He passed the toll-gate and drove on to the bridge at a walk. The plaintiff was sitting with his back to the entrance, but the other workmen called to the defendant to halt. He did not understand, or, as he declares, did not hear what was said, and went straight forward. This brought the top of the wagon in contact with the planks. They were thrown down, and the plaintiff falling with them was much hurt.

Two questions arise on this evidence: one, can the defendant justly be charged with negligence? the other, is the plaintiff free from the fault which he imputes to the defendant?

If the former question were the only one we should be slow to disturb the verdict. The jury have found that the defendant heard in time to check his horses, and it is not a sufficient ground for overruling their decision that the judge before whom the case was tried would have drawn a different conclusion from the evidence. On the latter point we are, however, distinctly of opinion with the defendant. In laying planks across a public thoroughfare in a position to be thrown down by any passing vehicle the plaintiff exhibited a culpable indifference to his own safety and that of others. Nor was he less careless, in not taking some means of giving notice that could not be misunderstood. The defendant might with more reason claim damages from him than he from the defendant. If the plaintiff had escaped without injury, and the planks had fallen on the defendant or his horses, the jury would have been as ready to decide in his favor as they were to find a verdict for the plaintiff. When the facts are proved or conceded, negligence is a question of law, which should not be left to men who are not versed in the principles of jurisprudence.

Rule absolute.

John Dolman, Esq., for plaintiff.

R. P. White, Esq., for defendant.

[Leg. Int., Vol. 30, p. 12.]

SMITH vs. CUNNINGHAM.

1. A case will not be continued on account of the absence of the plaintiff, a material witness, where opportunity has been had to take his depositions.
2. The duty of parties in regard to the service of subpoenas and taking depositions, and the cases in which continuance will be granted, considered.

Motion to take off nonsuit. Opinion delivered *January 4, 1873*, by

LYND, J.—When the cause was called for trial, the counsel for plaintiff moved for a continuance on the ground that the plaintiff was a material witness, and was to ill to appear in court. A doctor's certificate was produced, to the effect that she (the plaintiff) had been sick for a month or two, and that it would not be safe for her to leave her room, or be subjected to the excitement of the trial. Her counsel stated that he had not known of her illness until within a week or ten days of the time fixed for trial. As the motion was opposed by defendant's counsel, and as it did not appear that her deposition could not have been taken, a continuance was refused. I offered to leave the cause open until her deposition could be taken. The counsel for plaintiff, however, while not denying that she was well enough for that purpose, refused to go to trial in her absence; and, upon motion of defendant's counsel, I entered a nonsuit.

We are of opinion that this case is not comprised within any rule of court, but was discretionary with the judge sitting at *Nisi Prius*; and that whenever application is made for the continuance of a cause, on account of the sickness of a party and witness, unless it clearly appears, on the day of trial, that the illness is too severe to admit of the taking of the deposition, it is entirely proper to refuse a continuance. The most the court can do in such case is to hold the cause until the deposition can be taken. Where the illness is of a character to confine the party to the house merely, and is known to the counsel, due diligence should be used to have the deposition taken by the day fixed for the trial.

As some misapprehension is prevalent as to the construction of rules of court 90 and 92, it is deemed proper to make some observations upon that question.

Rule 90 obviously was framed to meet the case of a witness who *resides in*, and who is actually within the county within five days of the day of trial, but who is *absent from it on that day*. It prescribes a rule of diligence as to the search for those witnesses, *i. e.*, the search must commence, subpoena in hand, at least five days before the trial, in order to make out a right to a continuance on the ground of their absence on that day.

It has no application to the case of a witness who is within the county on the day of trial. If due diligence has not been used to subpoena him, the case must go on without him; if, notwithstanding such diligence, there has been a failure to reach him, the court will hold the case till further efforts can be made. The rule does not apply to a witness confined to his residence by sickness, because it expressly declares that there shall be no continuance if he can be found at his residence. If the rule applied to such witness, it would be necessary not only to take out and serve a subpoena upon him, but to take it out at least five days before

the day for trial. This certainly, where the witness was too ill to leave his residence, would be a very unnecessary and very vain requirement.

Rule 92 is supplemental to rule 90, and applies to the same, and to no other cases of absence. It does not enlarge the operation of said rule, but is essentially restrictive of the right of continuance.

The same facts must appear under the one as under the other rule to justify a continuance; but under the earlier rule the facts were shown orally to the court and a continuance was a necessary result; while under the latter, the applicant must file an affidavit of the facts of record, and the opposite party may defeat a continuance, by admitting that the witness, if present, would testify as set forth in the affidavit.

It is plain that both rules refer to witnesses who are beyond reach of subpoena and attachment. Where they are within reach of the former the only time that ought to be granted would be that required to serve it upon them, and to enforce that service, if necessary, by attachment. It would be quite as reasonable to ask for a continuance, where a witness has been duly subpoenaed and is absent on the day fixed for trial; and yet all that is ever done, in such case, is to hold the cause till the witness is brought in.

"Continuance" means that the opposing party shall be delayed, as to trial, for three months; this surely ought not to be permitted, when further diligence might, perhaps, produce the missing witness before the rising of the court for the day; or when it is practicable to produce his written testimony.

No more under rule 92 than under rule 90, can a continuance be obtained because of the absence of a witness, where the party knew of his intended absence in time to take his deposition.

It was argued by plaintiff's counsel that a party had a right to the benefit of the presence of his witness before the jury, which he ought not to be deprived of without his fault and by circumstances beyond his control. But the intended absence of a witness, who leaves the county more than five days before the day fixed for trial, is not the fault, nor is it within the control, of a party; and yet, if he have timely knowledge thereof, he must be content with his deposition before the jury; and even where he has no such knowledge, he may be forced to content himself with a mere admission by the other side as to what the witness would testify to. It is impossible to see why a party should not "try" upon the deposition of a sick witness as well as upon that of one who is absent from the county.

In truth, the law recognizes no difference between *viva voce* and written testimony; and in no case would a cause be continued where a party had had an opportunity to provide himself with the latter, and had deliberately neglected, or (as in the case before us) deliberately refused to avail himself of it. In *Bond's Lessee vs. Hunter et al.*, 1 Y. 284, a continuance was refused to the defendants, where the witness' deposition had been taken, though he had been afterwards duly subpoenaed by them to attend at the trial.

Rule discharged.

George Junkin, Esq., for plaintiff.

J. B. Gest, Esq., for defendant.

[Leg. Int., Vol. 30, p. 12.]

HAMILTON vs. LYLE.

A sheriff is not liable for non-service upon a non-resident when he followed the instructions and directions of the plaintiff.

Rule to take off nonsuit. Opinion delivered *January 4, 1873*, by

BRIGGS, J.—Both Stetson, and Roberts his agent, were residents of Massachusetts. The former being manager of various places of amusement, rented for a few weeks the Walnut street theatre, in this city, and sent Roberts, his agent, here in advance, to prepare for the engagement soon to come off.

While Roberts was alleged to be here the plaintiff sued Stetson and placed the summons in the defendant's hands as sheriff for service, with the information that the defendant or his agent was then at the Walnut street theatre. The sheriff accordingly proceeded to the theatre to make the service, but could find neither Stetson nor his agent, and so reported to the plaintiff's agent, who left the foregoing instruction as to where and how the service could be made. No further information was given, and the sheriff made no further effort to serve the summons. Neither Stetson nor Roberts had other residence or place of business here than at the theatre. These facts were disclosed by the plaintiff's own witnesses.

He now brings this suit against the sheriff for failing to serve the summons. Upon the foregoing facts a nonsuit was directed, and in this the plaintiff alleges there is error.

The modes of serving a summons in this State are clearly defined by statute: on residents within the county, personally, or by leaving a copy at the defendant's residence, with an adult member of his family. On a non-resident doing business in the State by service on his clerk or agent at his usual place of business or residence.

The sheriff should be held to the strictest accountability for service upon a resident defendant, because he is presumed to know, or may ascertain upon inquiry, the residence of every person in his county. While such is the law as to resident defendants, surely a more relaxed rule prevails as to non-resident strangers temporarily sojourning in the county. Being strangers the law does not presume the sheriff knows them or where they may be found. If pointed out, of course he is bound to make the service. But if not pointed out except by designation of place, is he bound to do more than go to the place appointed and make a reasonable effort to effect the service, and if he do not find the defendant there, does the law presume he may find him elsewhere in the county?

Failing to find Stetson or his agent at the theatre as per information given the sheriff when the writ was left with him, was not the sheriff remitted to the same uncertainty as to their whereabouts as he would have experienced had no information been given him at all, and in such case, surely no court would hold him answerable for non-service?

But should the sheriff have gone to the theatre a second time? Why should he, unless informed by the plaintiff that Stetson or his agent had returned?

They were not residents, and the law does not presume that they would return. When the sheriff had obeyed the instruction given him, we think it was the plaintiff's duty to again locate Stetson or his agent before seeking to hold the sheriff responsible, and not having done so, we are of opinion that he has no cause to complain, especially as his own testimony shows that the sheriff made an effort to serve the summons in accordance with the instructions given him when he received the writ.

Rule discharged.

Wm. L. Hirst, Esq., for plaintiff.

[Leg. Int., Vol. 30, p. 12.]

CALLAHAN vs. ACKLEY.

A recovery cannot be had upon a note given for the balance of plaintiff's claim which plaintiff had just released in a deed of composition with other creditors.

Rule for a new trial. Opinion delivered *January 4, 1873*, by

BRIGGS, J.—Whether we regard the arrangement between the plaintiff and defendant resulting in the giving of the note in suit to the plaintiff as fraudulent to the defendant's other creditors, or as one made between the plaintiff and the defendant immediately after the creditors signed the composition release, it is alike fatal to the plaintiff's right of recovery.

If the former, it is void, because of the fraud upon the other creditors, who certainly would not have signed the release for fifty per cent. of their claim had they known the plaintiff was to be paid his in full. *Stewart & Bro. vs. Blum*, 4 C. 225; *Mann vs. Darlington*, 3 H. 310.

If the latter, there was no consideration to sustain a recovery upon the note, it being admitted that it was given for the balance of the plaintiff's claim released but two hours before. The claim being thus released, there was nothing left to serve as the consideration for the note. *Snively vs. Read*, 9 W. 396.

The cases where moral obligation has been held to operate as a consideration to sustain a promise, have arisen where the promisor had been discharged by his own act, as in bankruptcy, or by operation of law, as by the statute of limitations, and not, as in this case, by the act of the creditor himself. Here the plaintiff of his own accord joined the other creditors in executing the composition release; and by that act he so effectually remitted to the defendant his entire claim that no court would enforce it in view of the release. The claim then being entirely gone how can he recover upon the note, the only consideration for which is the balance of the released claim; coupled, it is true, with the defendant's promise to pay? But we have already shown that a promise growing out of a fraudulent arrangement can be of no avail. Indeed, such a promise is void, even as between the parties, on the ground of policy. Courts of justice are always closed against parties to a fraud. Mr. Kent, in volume 2 of his Commentaries, page *466, upon this point uses the following expressive language: "Contracts are illegal when founded on a consideration *contra bonos mores*, or against the principles of sound policy, or founded in fraud, or in contravention of the positive provisions of some statute law. If the contract grows immediately out of, or is

connected with, an illegal or immoral act, a court of justice will not enforce it. . . . The courts of justice will allow the objection that the consideration of the contract was immoral or illegal to be made even by the guilty party to the contract, for the allowance is not for the sake of the party who raises the question, but is grounded on general principles of policy."

It hence follows that the rule for the new trial must be made absolute. Rule absolute.

Theodore M'Fadden, Esq., for plaintiff.

H. R. Edmunds, Esq., for defendant.

[Leg. Int., Vol. 30, p. 44.]

HENDERSON vs. THE HYDRAULIC WORKS

1. In an action for damages for wrongful dismissal of a plaintiff, who is called as a witness, the defendants may cross-examine him as to whether he faithfully performed his duties.
2. An agent who is wanting in fidelity forfeits his right to his place, whatever may be the nature of his default, and whether it is or is not a source of injury to his principal.
3. Facts brought out in cross-examination, and not explained, entitle the plaintiff in this case to have the nonsuit taken off.
4. It seems that the right of cross-examination is co-extensive with the testimony in chief as a whole.

Motion to take off nonsuit. Opinion delivered *February 1, 1873*, by HARE, P. J.—This case presents several points of interest. The suit was brought to recover damages for the wrongful dismissal of the plaintiff. Agreeably to his testimony, the defendants, who are a body corporate, employed him as superintendent, without any limitation as to time, at the rate of \$3000 per annum. He remained fourteen months in that position, and was then discharged by the directors. The witness was cross-examined as to the nature of his duties, and the manner in which they had been fulfilled. It appeared from his statement, that he acted generally as superintendent, but did not have charge of the books. These were kept by his brother-in-law, who had been appointed at his instance. The bookkeeper became a defaulter to the amount of \$2000. It was the plaintiff's duty to receive the moneys paid to the corporation, and deposit them in his name in bank as their agent. He drew checks for his wages, as he thought "the concern could bear it." These drafts were sometimes in advance of the amount due. Such an overdraft took place before his dismissal, and had not been made good. He also lent \$100 of the defendants' money to a friend, expecting to make it up out of his salary. These transactions were all entered in the books. This cross-examining took place under objection. When it ended, the defendants moved for a nonsuit, on the ground that the plaintiff had abused his trust, by using his employers' money for his own purposes. This cast on him the burden of proving a condonation or excuse. It was contended that no such explanation had been given, and that if the case was suffered to go to the jury, there would be nothing upon which they could consistently render a verdict for the plaintiff.

The motion was granted, and the plaintiff now seeks to have the nonsuit taken off on two principal grounds. One of these is, that the plain-

tiff gave no evidence tending to show that he had faithfully performed his duty as an agent, and that the defendants could not, therefore, cross-examine as to a matter which did not appear in the examination in chief. The plaintiff's case was sufficiently made out by proving a hiring for a year, terminated by an abrupt dismissal. If there was an excuse for an act which was *prima facie* wrongful, it should be reserved until it became the defendants' turn to speak. They were not entitled to interrupt the plaintiff's case, by asking questions which were irrelevant to it, and out of place.

The fallacy of this argument will be obvious on considering the premise on which it depends. This assumes, that the testimony in chief did not conduce to prove that the plaintiff had fulfilled his duty as superintendent. Hence, the inference, that he could not be asked on cross-examination whether he had committed a default. If this allegation were correct, it would be conclusive of the propriety of the nonsuit. The action is *assumpsit* for the non-fulfilment of an executory contract. The plea of non *assumpsit* put at issue, the promise, the consideration and the breach. It was, therefore, incumbent on the plaintiff to establish that he had performed the agreement on his part, until he was prevented by the wrongful act of the defendants. He was not entitled to go to the jury on the bare ground, that he had entered the defendants' service, and been sent away. Fidelity is a condition precedent, whenever an agent seeks compensation from his principal. *Singer vs. McCormick*, 4 W. & S. 265. If, therefore, there had been no evidence on this head, the defendants might have asked for a verdict without taking the pains to cross-examine or call witnesses. But this would not be a just view of the plaintiff's testimony. His general allegation that he entered the defendants' service carried with it some presumption that he did his duty while there. Although vague and general, it still covered the whole ground of the defendants' promise, of the fulfilment of the contract on the plaintiff's part, and of the violation of it by them. That this was implied rather than expressed is obviously no reason why the defendants should not insist on the details which the testimony in chief omitted. They were clearly entitled to show from the plaintiff's lips, that the alleged service was vitiated by fraud, laches, or misfeasance. This was not the introduction of new evidence, but exploring that already given in search of a concealed defect. And the investigation was not only within the limits of the plaintiff's case, but of the testimony given in chief by the witness.

It is not, therefore, necessary for us to consider whether a witness may be cross-examined as to matters which, though not contained in his testimony, are yet at issue, and must be proved, in order to carry the case to the jury.

The point is not, however, as I suppose, a doubtful one. It was held in *Ellmaker vs. Buckley*, 16 S. & R. 372; and repeated in *McKinley vs. McGregor*, 3 Wharton, 370; and *Floyd vs. Bovard*, 6 W. & S. 75, that the defendant cannot introduce the facts of his own case, before he has opened it to the jury by cross-examining the plaintiff's witnesses. It results conversely, that any fact which is essential to the case of the opposite party, is a proper subject for cross-examination. The case of a party plaintiff or defendant consists of all the matters which, having

been alleged on one side and denied on the other at issue, are and must be established in order to entitle him to a verdict. In assumpsit under the general issue, the plaintiff's case comprises the promise, the consideration for it, and the breach, and the cross-examination may be as broad as the case. The defendant may therefore cross-examine as to all that constitutes the cause of action, if not with regard to matters in confession and avoidance. Such is the doctrine of the common law as practised in New York, Massachusetts, and Vermont: *Moody vs. Rowell*, 17 Pick. 490, 497; *Beal vs. Nichols*, 2 Gray, 262; *The Fulton Bank vs. Stafford*, 2 Wend. 483; *Linsley vs. Lovely*, 26 Vermont, 123; and I do not understand that *Ellmaker vs. Buckley* introduced a different rule, except in denying the right to anticipate the defence, which may be done in England, with the sanction of the court. It is indeed said in *Herusey vs. McGrath*, 2 P. F. Smith, 551, that "cross-examination as a general thing is only regular when confined to the testimony given by the witness in chief." It certainly ought not to transcend the testimony in chief, taken as a whole, or in other words, the case which the witnesses on the other side are called to prove. If it is confined to narrower limits, the plaintiff may distribute the case arbitrarily among the witnesses, and by restricting each to a particular line, prevent the disclosure of truths which he desires to conceal. Let us suppose that the action is assumpsit for the price of a horse, and that A and B are the plaintiff's servants and witnesses. A is aware that the horse was warranted, but not that he was unsound; while B knows that he was unsound, but not that he was warranted. The former is consequently called to prove the animal's condition, while the examination of the latter is confined to the contract of sale. Can it be that such a device will preclude any right that would exist, if the witnesses had been frankly told to narrate the transaction as it took place? Is it not obvious that the defendant should be permitted to elicit any fact from either, tending to qualify or contradict the statement of the other? In like manner, a clerk, who is put on the stand to prove an order for goods, may be asked whether they were delivered, and vice versa. So a witness, who testifies in chief that the plaintiff was hired to do an act, may be cross-examined as to the manner in which it was performed. That the court may properly allow such questions is beyond dispute, and I doubt whether they can be excluded without error. The right to cross-examine does not, however, necessarily involve that to ask leading questions, and a too willing witness may always be compelled to rely on his memory unaided by suggestions from the side to which he inclines. See *Moody vs. Rowell*, 17 Pick. 490, 498.

If the question is at all doubtful under ordinary circumstances, it is very clear where the witness is a plaintiff testifying in his own cause. The reason given in *Ellmaker vs. Buckley*, for restricting the right of cross-examination, is, that a party might otherwise have an opportunity of leading a witness, who, though called on behalf of the opposite party, was at heart hostile to his cause. Obviously there is no room for such an apprehension when a man takes the stand in his own behalf. The danger is not that he will understate his cause, or magnify that of his opponent. It is, that he may be led between prejudice and interest to keep back or distort the truth. Or he may, and not unfrequently does,

omit a material part of the case, where he is conscious of a hidden defect. Under these circumstances, to preclude the advocate from pushing the cross-examination far enough to detect the fault, is like depriving the surgeon of his probe.

If we now turn to the main question, it will appear from the plaintiff's evidence, that he used money which was not his, and which had been intrusted to his care. I thought at the trial that such an act, unexplained, on the part of a confidential agent, entitled his employers to determine whether he was trustworthy, and that their sentence could not be reviewed by a court and jury. This opinion seems to be sustained by *Singer vs. McCormick*, 4 W. & S. 265. There a commercial firm brought assumpsit against a clerk whom they had discharged, for money which he had received for their use. The defence was a set-off in the nature of a cross-action to recover compensation for the wrong done by removing him during the year for which he had been engaged. It appeared from the evidence given in his behalf, that the cause assigned for his dismissal was that he had made an unauthorized alteration in the ledger.

One of the partners who was put on the stand testified that the change was made in good faith by his direction, to correct an error in posting the account, by which he was debited with an item which should have been charged to the firm. He also stated that the original entry in the day-book was left untouched; so that the transaction would appear in its true colors to any one who examined the books. No evidence was given in reply, and the case turned wholly on the testimony of the witnesses called for the defence, which went to show that the act complained of had occasioned no real injury, and was induced by a sincere, if mistaken wish on the part of the defendant, to repair an error that might prejudice one of his employers. Yet the jury were directed to find for the plaintiff, and this instruction was sustained by the court above. Rogers, J., said, that the erasure was a breach of the fidelity which the defendant owed to his principals. As such, it made no difference that it was not actually productive of injury. The right of the master to dismiss the servant did not depend on the balance of profit and loss. It might be exercised whenever that servant showed himself to be unworthy of confidence in the business in which he was employed. Such had been the ruling in *Liebhart vs. Wood*, 1 W. & S. 266, in conformity with the English authorities. Nor was it a justification that the defendant had acted under the orders of one of the partners. Such a command had no weight in a matter affecting the interests of the other, and should have been disobeyed.

These decisions are closely analogous to the case in hand. They show that an agent who is wanting in fidelity forfeits his right to his place, whatever may be the nature of the default, and whether it is or is not a source of injury to the principal. This results from the right of the latter to guard against prospective loss, by getting rid of a man in whose principles he can have no confidence.

The motives of the agent can have no place in such an inquiry, if the act is unmistakably a breach of duty to the principal. Men whose minds are so constituted that they can use money which does not belong to them, in the belief that they are not doing wrong, are not on that account less dangerous. Such a pretence on the part of an agent im-

plies a culpable indifference to the trust reposed in him. An express or implied authority from the principal is of course a justification. But the burden of proof rests on the party who is *prima facie* culpable. He must show that the act was justifiable, if not to a demonstration, at least with a reasonable degree of certainty; and if he fails in the attempt the jury will not be allowed to supply the want of evidence by conjecture.

There is, however, a consideration which renders it doubtful whether the nonsuit should be allowed to stand. It came out during the cross-examination, that the dismissal was in writing. The defendants might, therefore, have called for the letter. If it had not been forthcoming, the failure to produce the best evidence of an essential part of the plaintiff's case must have resulted in a nonsuit. Instead of taking this course the defendants asked: "What was the cause of your removal?" The plaintiff replied, "My unwillingness to assign certain patents to which the directors were not entitled." It is not unlikely that in saying this the plaintiff meant to speak of the motive which, as he supposed, governed the directors, and not of the cause actually assigned for his discharge. But as the language used admits of either interpretation, and the defendants did not press the inquiry, the jury might well have taken the plaintiff's words in the sense which was most favorable to him. The weight of authority seems to be, that a master who dismisses an unfaithful servant is not obliged to give his reasons. The question is one of circumstances, although justice and fair dealing will generally lead him to speak out. The case is obviously different where the cause assigned is insufficient, or not founded in truth. Such an allegation does not operate as an estoppel, or preclude the employer from relying subsequently on a different ground. He may still show that the misconduct of the agent was such that he could not prudently be suffered to remain. But it may, under these circumstances, be a question for the jury, whether the ground taken at the trial is real, or an after-thought assigned to justify a course which was prompted by another motive. If, for instance, it were to appear in the present instance that the defendants made an unjust attempt to compel the plaintiff to relinquish a right which was his, and that the reason for dismissing the plaintiff, as given at the time, was his refusal to accede to an unjust demand, it might be ground for an inference that the accusation now brought against him is a pretext designed to cover the original wrong. Such, agreeably to one view of it, is the effect of his testimony in reply to the questions put by the defendants. And as they chose to rely on the memory of the witness instead of requiring the writing to be produced, it cannot be said that there was nothing to go to the jury. It is not the least among the advantages of cross-examination, that it not unfrequently throws an unexpected light on the cause, which disappoints the party who puts the question. The outline which the plaintiff leaves unfinished grows under the hand of the defendant's counsel. I need hardly say that this is a merit in the eyes of the law, as a moral science looking to the discovery of truth for the ends of justice. The rule to take off the nonsuit is made absolute.

George Northrop, Esq., for plaintiff.

Samuel Dickson, Esq., for defendant.

[Leg. Int., Vol. 30, p. 44.]

HOOD *et al.* vs. THE BUILDING ASSOCIATION.

1. After a *sci. fa.* has been issued on a mechanics' lien, defendant cannot enter security in the *usual form* under the act of 1868, and ask the court to quash writ.
2. The court will not approve of the security, unless the issuing of the *sci. fa.* is recited in the bond, and it contains a warrant of attorney for entering judgment for the amount that shall be found due with interest and costs.

Sci. fa. sur mechanics' claim.

Motion to approve "security" and to quash the writ.

Counsel for defendant cited and relied on *Seipel vs. Weirman*, 8 Phila. R. 26; and *Hoffman vs. Haines*, 8 Id. 243.

PER CURIAM. February 1, 1873.

The defendants, under the act of August 1, 1868, section 4, required the claimants to file an affidavit of the amount due, and upon the filing thereof by the latter the defendants tender a bond with two sureties in the *usual form*, and move to quash the *scire facias*.

As the defendant did not avail himself of the privilege of the act, until after the claimant had issued the *scire facias*, the court will not interfere with the regular course of adjudication of the amount due upon the claim. The defendants must plead to the writ and order the cause on the trial list.

In such case the court will not approve of the "security" unless the issuing of the *scire facias* is recited in the bond, and unless it contains a warrant of attorney for the entering of judgment against the obligors for the amount that shall be found to be due upon the claim, with interest and costs.

The motion to quash is dismissed, and the "security" offered by the defendants is not approved.

Charles S. Pancoast, Esq., for plaintiff.

C. H. Downing and George W. Dedrick, Esqs., for defendants.

[Leg. Int., Vol. 30, p. 52.]

PATTERSON vs. HANKINS.

1. The pendency of an attachment execution is no cause for suspending proceedings by the legal holder of the debt.
2. *Philada. Saving Co. vs. Smethurst*, 2 Miles, 439, overruled.

Rule for judgment. Opinion delivered February 8, 1873, by

BRIGGS, J.—The pendency of an attachment execution or of process of foreign attachment, is not cause for abating or suspending proceedings by the legal holder of the debt, against his debtor, until the attachment shall be disposed of.

The obtainment of the judgment reduces to certainty the amount due by the defendant, but such can in no sense be said to injure or prejudice the parties, for it is for the benefit of the plaintiff and defendant that the issue between them should be prosecuted to judgment. Nor would such result work injustice to the plaintiff in the attachment, as it would furnish him with an ascertained sum which he might accept, if he desired

to do so, as the measure of the defendant's liability, without further litigation in that respect.

It is the judgment in the attachment against the garnishee which fixes his liability to pay his plaintiff's creditor, rather than such plaintiff himself. Prior to such judgment the proceedings in the attachment are but the means of ascertaining the amount due by the garnishee, and when so ascertained, he is required by operation of the statute to pay his plaintiff's attaching creditor in the stead of to his own plaintiff.

Then, but not till then, is he entitled to stay the hand of his own creditor-plaintiff, for till then he sustains no injury.

The mere pendency of the attachment should suspend payment until the attachment be disposed of, but not adjudication between the legal holder of the debt and his debtor. It will be observed, that this conclusion is antagonistic to that reached in the case of *The Philadelphia Saving Co. vs. Smethurst*, 2 Miles, 439.

But it seems to us that it is the better practice to allow the parties to proceed to judgment irrespective of the attachment, and then, if necessary, control the judgment so as to do justice to all the parties. Nor is this view without the sanction of express authority. In *Braden vs. Scott*, 1 P. F. Smith, 357, it is said that "the pendency of an attachment execution is no bar to an action against the garnishee at the suit of the legal holder of the debt attached.

"It neither abates nor bars the action, and pleading it can have no other effect than giving notice of the claim of the attaching creditor, and to enable the court to mould the judgment to protect the rights of the parties."

Judgment is entered for the plaintiff. Execution to stay until the attachments recited in the affidavit of defence shall be determined, or, further order of the court.

John O'Byrne, Esq., for plaintiff.

[Leg. Int., Vol. 30, p. 52.]

CITY TO USE OF BROOKS vs. LEA.

1. In an action upon a municipal claim for repaving footway, defendant can only deny that the work was done, or materials furnished, or that the price charged is greater than its value, or that it has been repaid or released.
2. The ordinance of June 8, 1870, that "it shall be unlawful for the department of highways to enter into contracts for repaving streets," applies only to that part of the street between the curbs.
3. The pavements upon three sides of one lot cannot be considered all one pavement.

Rule for new trial. Opinion delivered *December 3, 1872*, by

MITCHELL, J.—This was an action upon a municipal claim for repaving the footway in front of defendant's lot.

The lot in question was a large one, having three fronts on Twentieth street, Nichols street, and Columbia avenue, respectively. The controversy in this case related to the Twentieth street front only.

The plaintiff read the claim in evidence and then rested. Thereupon the defendant's counsel put in evidence the order from the highway department to the equitable plaintiff, Brooks, dated July 25, 1870, to *repave* the footway on Twentieth street, between Oxford and Columbia avenue, and also the order book of the department, showing the margin

or stump of the order, which stated that on July 25, 1870, order No. 671 had been given to John Brooks, to *repair* the Twentieth street pavement of said lot.

Defendant then gave in evidence the ordinance of June 8, 1870, making it unlawful for the highway department to enter into contracts for the repairing of streets (Ord. 1870, p. 310), and called Mr. Dickinson, the chief commissioner of highways, who testified as follows, "there was no contract made with Brooks further than the order to do the work. We never make contracts in such cases, as the law fixes the price, and we don't have to make any contract. Brooks was not an officer in our department. He was only employed as a bricklayer."

It further appeared in evidence, that on March 21, 1870, the highway department gave notice to defendant to repave the pavement on Twentieth street, and to pave the footwalks on Nichols street and Columbia avenue. On receipt of these notices, defendant sent them to one Francis P. Murray, who was usually employed by him in such matters.

Murray testified, that he put his men to *clear off the mud* on the Twentieth street pavement, and then went on to pave the footwalk on Columbia avenue. While at this latter work, Brooks tore up the pavement on Twentieth street, and proceeded to repave it. "I told him," says Murray, "he had better be careful, as I had it in charge. I don't know that I told him I was going to repair, as I didn't think it needed it, except at one spot. I thought if we reset the curb it would do very well. This was after the twenty days. I had begun work on Columbia avenue before the twenty days were out."

Defendant having closed, the plaintiff called witnesses, who testified as to the bad condition of the footwalk before it was repaved, and then closed.

Upon this evidence the jury were directed to find a verdict for the plaintiff, subject to the question reserved for the opinion of the court, whether, under the whole case, he was entitled to recover. We have now to consider whether upon this evidence the plaintiff was entitled to recover, and if so, whether any part of the case should have been submitted to the jury.

By the 4th section of the act of March 11, 1846, Purdon, 752, pl. 30, the claim filed is evidence of the facts stated in it, that is, of the notice to defendant to repave his footway within twenty days, of his failure to do so, of the authority of Brooks to do the work, of the fact that the work was done, and that the price charged was the correct price. *Thomas vs. Northern Liberties*, 1 H. 117; *Wistar vs. Philadelphia*, 3 Grant, 311; *City of Philadelphia vs. Burgin*, 14 Wr. 545; act of April 19, 1843, Purdon, 752, pl. 29.

Having read his claim in evidence, therefore, the plaintiff had made out a case. Is there anything in the undisputed facts, which, as matter of law, destroys this *prima facie* case?

It is urged by the defendant, first, that the order of the highway department to Brooks was to *repair*, and that he had no authority therefore to *repave*. It is extremely doubtful, under the rule laid down in *City vs. Burgin*, 14 Wr. 545, whether this defence could, under any circumstances, be available to this defendant, but it is sufficient to say, that the evidence does not bear out the objection. It is true that the

margin or stump of the order book of the department has it *repair*, but the act of the department, which gave the plaintiff his authority, was the *order*, and that commands him to *repave*. We can see nothing in this objection.

Secondly, it was argued by defendant, that the whole work was unlawfully done, because prohibited by the ordinance of councils of June 8, 1870. The language of the ordinance is, "that it shall be unlawful for the department of highways to *enter into contracts for the repairing of any street*, but all repairing of streets shall be done under the supervision of the department of highways, by the supervisors of the district in which the said repairing is required." (Ord. 1870, p. 310.) By reading this ordinance with those *in pari materia*, it is quite clear that the repairing contemplated by this ordinance is that of the cartway between the curbs. This is by law imposed on the public treasury, and differs in many essential respects from that of the footway, which is to be paid for by the owners of the property. The word "street," in the ordinance of 1870, must be taken in this sense, and has no application to this case.

Thirdly, it was urged by the defendant, and this was the point on which most stress was laid in the argument, that he was proceeding with due diligence to obey the command of the notices, when the plaintiff interfered, and did this work. To establish this point, his argument is, that Columbia avenue, the Nichols street, and the Twentieth street pavements being upon three sides of the same lot, were all part of one pavement, and therefore his men, while upon any part of it, were to be considered as working upon the whole. We cannot regard this argument as sound. The language of the ordinance of May 3, 1855, sec. 3, City Digest, 1869, p. 312, under the authority of which this work was done, is, "whenever councils shall order the paving, etc., of the footway of any street, *every owner of ground fronting on said street*," etc. For the purpose of paving, etc., each front of ground upon a street is the subject of municipal regulation, independently of any connection with other streets. These may be paved at very different periods, as was the case in the present instance, the Twentieth street side of this lot having had a pavement for several years, while the other sides on Nichols street and Columbia avenue were unpaved. It is quite clear, therefore, that the notices to pave or repave the different sides of this lot must be treated as if they related to separate lots, fronting on the different streets respectively. In this view, the defendant has no case at all, for passing over a question not free from difficulty for him, whether the law does not require the work to be *finished* within twenty days from the notice, there is no evidence that he even began to repave the Twentieth street pavement, within the required time. Murray, his workman, says he put his men to *clear off the dirt* on Twentieth street, and then went on to pave Columbia avenue. Murray thought it would do if he reset the curb, but at the time the plaintiff received his order and commenced work in the latter part of July, more than *four months* after the notice was received, Murray had not commenced to reset the curb. Upon the defendant's own evidence, therefore, he was not in time.

Having thus shown that the defendant's objections to the claim upon matters of law were not valid, was there any question upon matters

of fact which ought to have gone to the jury? We do not perceive any. The defences, which are allowed to be made in such cases, are expressly limited by law, and defendant made no effort to establish any of them. The claim filed, being read to the jury, was sufficient evidence of the notice to defendant to repave his footway within twenty days, of his failure to do so, and of the authority of Brooks to do the work. Act of March 11, 1846, sec. 4, Purdon, 752, City Digest of 1869, p. 281; *Wistar vs. City of Philadelphia*, 3 Grant, 311; *City vs. Burgin*, 14 W. 545.

The claim was also prima facie evidence that the work was done, and that the price charged was a proper price. In fact, there was no evidence nor any effort to contradict either fact. By the act of April 19, 1843, Purdon, 752, City Digest, 1869, p. 280, "upon any such trial, it shall only be lawful for the defendant to deny that the said work was done or materials furnished, or prove that the price charged therefore is greater than the value thereof, or that the amount claimed has been paid or released." No evidence was offered by defendant, tending to prove any of the permitted points of defence, and there was, therefore, no fact in dispute for the jury.

The direction was therefore right, and this rule must be discharged.

Isaac Gerhart, Esq., for plaintiff.

E. Spencer Miller, Esq., for defendant.

[Leg. Int., Vol. 30, p. 108.]

CLARK AND WIFE vs. KOCH.

A married woman cannot carry on an action in her husband's name and her own for a tort to herself without his consent and against his wishes.

Rule to strike off warrant of attorney. Opinion delivered *March 29, 1873*, by

THAYER, J.—An action was brought in this court in the name of husband and wife as plaintiffs, against the defendant, who is a physician, for malpractice upon the wife. The defendant ruled the plaintiff's attorney to file his warrant of attorney. He filed a warrant of attorney signed by the wife alone. Thereupon the defendant took the present rule, and upon its return the husband appeared by counsel before the court and stated that the action had been brought without his authority and against his wishes, and that he was unwilling to be a party to the action. In the history of that important and, in many respects, beneficent revolution, which has taken place in the law relating to marital rights, and which is recorded in the legislation that emancipates married women and their estates from the control of their husbands, a tolerably advanced position has been attained. But we are not aware that it has proceeded so far as to enable a married woman to compel her husband against his will to carry on a suit for a tort, and to subject himself to the payment of counsel fees, costs, and other expenses of litigation, to say nothing of the possible contingency of an action for a malicious civil suit. Whether a married woman can maintain such an action in her own name alone, just as she may for her property (see 1 Harris, 480; 4 Ib. 134), may, to say the least, admit of a reasonable doubt. Certain it is, that no such

power is conferrèd upon her by the act of 11th April, 1848, or any of its supplements, unless it is to be deduced from the consideration that she has a property in herself as well as her possessions, and as she no longer belongs to her husband she must belong to herself, and may therefore maintain an action for injuries to herself, as well as for her chattels. But we need not forestall the ingenuity of counsel upon a point so interesting which is not yet before us. The question is, not whether she can maintain such an action alone, but whether she can compel her husband to carry it on, against his consent, contrary to his wishes, and at his own cost. Perhaps it may come to that, but we do not think we should be justified in so holding at present. Therefore, ordered, that all proceedings be stayed in the present action until a warrant of attorney from the husband shall be filed of record.

Geo. S. Graham, Esq., for husband.

John O'Byrne, Esq. (with whom was Ed. McCabe, Esq.), for wife.

Mortimer Harris Brown, Esq., for the defendant.

[Leg. Int., Vol. 30, p. 108.]

LESLEY vs. MORRIS.

1. A vendee of real estate, who has bargained for a good and marketable title, will not be compelled to accept the property if it is burthened with a building restriction which will impair its enjoyment or affect its marketable value.
2. Such a restriction created by the covenant of a former owner is not removed by a subsequent judicial sale for taxes.
3. Whether a vendee is bound to accept a tax title *dubitat*.
4. It is not a defence to an action for the purchase-money that incumbrances or defects of title existed at the time of action brought, if, at the time of trial, they have been removed, or cured.

Rule for a new trial. Opinion delivered *March 29, 1873*, by

THAYER, J.—Covenant by vendor against vendee upon articles for the sale of land. The defendant declined to take the land or pay the purchase-money. His defence was first, that the plaintiff's title was a tax title, which he contended was not a good and marketable title; and secondly, that the property was subject to certain building restrictions imposed upon it by a former owner in the line of the plaintiff's title.

In answer to the first objection, it was replied that a tax title is, if regular in all respects, a good title, and one which the defendant was bound to accept; and further, that inasmuch as the plaintiff was not only the purchaser at the tax sale, but also administrator *cum testamento annexo* of the person who was owner at the time of the sale, and had under the will a full power to sell and convey, the title could be freed from all doubt by the execution of the power, which the plaintiff was ready to do.

We are not prepared to say that a tax title is not such a title as a purchaser is bound to accept, where it clearly appears that the tax was due and unpaid, that the proceedings were in all respects regular, and that the time of redemption has gone by. But it is unnecessary to decide this. It is a sufficient answer to the defendant's objection, that the plaintiff was, at the time of the trial, in a position to remove the objection, and to make an indefeasible title, and that he was prepared, and offered to do so. It is not a defence to an action for the purchase-money of

land, that defects of title, or incumbrances, existed at the time of action brought. In Pennsylvania, the law in such cases is administered upon the same principles, and regulated by the same rules which prevail in equity. Where a chancellor would decree a specific performance, there the plaintiff shall recover the purchase-money. Where he would refuse it the vendee may refuse to accept the estate and to pay the price of it. The defendant stands upon an equitable defence, and must himself submit to all equitable conditions. Hence, although defects may exist at the time of the bargain made or the bringing of the action, yet, if the vendor has cured them, and is ready at the trial with a good title, he is in time, and entitled to insist upon performance. *Hart vs. Porter*, 5 S. & R. 201, and *Thompson vs. Carpenter*, 4 Barr, 132, are illustrations of the rule. In the former case, at the time of action brought the land was subject to a widow's dower, but the vendor having obtained a release of it before the trial, it was held that the defence failed and that the purchaser must perform the contract. When defects of title have been remedied subsequent to the bringing of the action for the purchase-money, the only question which remains is, as to who shall pay the costs of the action, and even that, as is said by Tilghman, C. J., is an equity which depends on a variety of circumstances in the conduct of the parties.

The plaintiff's answer to the second branch of the defendant's case was, that the building restrictions of which the defendant complains had been removed, by operation of law, by reason of a subsequent judicial sale for taxes, and that if they had not been removed, the restrictions were not in themselves of such a character as seriously to affect the value of the property.

It would be a very dangerous doctrine to establish, that a covenantor who is not a party to the proceedings for the collection of the taxes, and who had no notice of their existence, should, without any fault of his, be deprived of a valuable right—a right which is as much property as the land itself. Such a doctrine would furnish a very easy method by which covenantors and their assigns might evade the most solemn obligations, and fraudulently rid themselves of troublesome servitudes for which they have received a large price. Such a construction of the laws relating to the collection of taxes does not appear to be necessary in order to secure the payment of the tax, and would produce a manifest injustice without any important advantage to the State or the city. This then is precisely the case in which the argument from inconvenience is decisive of the construction. The words of the various acts of assembly relating to the levying and collection of taxes have no such necessary meaning or effect as that which the argument for the plaintiff attributes to them, and this being so, the great inconvenience which would result from the construction which he contends for supplies a powerful reason for believing that such a construction was never contemplated by the Legislature, and fully warrants us in rejecting it. The decisions and the general current of legislation upon this subject tend greatly to strengthen this conclusion. That a ground-rent was not divested by a judicial sale for taxes assessed upon the land was settled by the courts before the passage of the act which expressly so enacts. *Irwin vs. The Bank*, 1 Barr, 349; *Salter vs. Reed*, 3 Har. 260. The legislation which protects mortgages

which are prior to tax claims is also a clear indication of the policy of the State upon the subject. The right which is acquired by the covenantee and his assigns in a building restriction, such as that which exists in that of the line of this title, is a right not in the land, but appurtenant to the land. Like a ground-rent, it is an interest not in the land itself, but incident to the ownership of another, and arising out of a covenant fastened upon it by a former owner. The same reasoning and the same policy which protects a ground-rent from being divested by the sale of the land for taxes, ought therefore to protect the right which a covenantee and his assigns have in a building restriction.

The particular restrictions in the present case arose out of a covenant not to build on the lot any frame or wooden buildings, and that if any piazza or back buildings should at any time be erected, the same should be erected fronting to the south. It would be difficult to maintain that a restriction against the erection of wooden buildings in a locality where their erection is prohibited by law is a restriction which would impair the value of property, or render it inequitable to compel the purchaser to perform his contract. The first restriction, so reasonable in itself, and in such entire accord with the local law, would hardly be a serious impediment in the plaintiff's path. But the second restriction is of a different character. By means of it an absolute and unqualified use is converted into one which is clogged with conditions and restricted in its enjoyment. A perpetual prohibition of this kind fastened upon property has a tendency not only to diminish the enjoyment of the estate but also to affect its marketable value to a considerable degree; a degree very difficult to be measured by any pecuniary allowance to be made to the defendant, and which makes his equity incapable of accurate or reasonable adjustment in money. He did not bargain for an estate fettered by a perpetual restriction upon the enjoyment, but for an absolute and unqualified ownership, and if that which is offered to him is not that which he bargained for, and is incapable of being made such, he ought not in equity to be compelled to accept it.

Rule absolute.

George W. Thorn, Esq., for plaintiff.

D. W. Sellers, Esq., for defendant.

[*Leg. Int.*, Vol. 30, p. 108.]

BISHOP vs. LEHMAN.

Where a party was taken entirely by surprise by an unexpected attack upon the character of one of his most important witnesses, which attack was made in the absence of the witness, and near the close of the trial, when there was no opportunity to repel it, a new trial was granted on that account.

Rule for a new trial. Opinion delivered *March 29, 1873*, by

THAYER, J.—The action was for the price of a steam-engine built for the defendant by the plaintiff. The defence was, that it was imperfectly constructed, defective in its parts and unfit for use. Several machinists were examined as experts by the defendant. Among them one who testified that he had been in the business thirty years, and whose testimony was very strong in favor of the defendant. When his examination was finished he left the court-room, supposing that his attendance

was no longer required. In his absence, and near the close of the case, the plaintiff called two witnesses, who swore that the character of this witness for truth and veracity was bad, and that they would not believe him on his oath. The defendant was taken entirely by surprise by this attack upon his witness and had no witnesses at hand to sustain him, while the witness himself was absent, and altogether ignorant of the public attack which had been made upon his character.

There is no rule which requires notice to be given of an intention to assail the character of a witness, yet one must recognize the possible injustice which may arise from a wholly unexpected attack upon an absent man. Such a warfare should at least be in a fair field and face to face. Ambuscades are justifiable in war, but are not favorably regarded by the law, which labors in all its proceedings to prevent surprise. Thus, in the *Queen's Case*, Abbott, C. J., in delivering the unanimous opinion of the judges in defence of the rule which requires that a witness shall first be interrogated with reference to contradictory statements by the proof of which it is proposed to impeach his credit, observed: "It is, in our opinion, of great importance, that this opportunity should be thus afforded to the witness, not only for the purpose already mentioned, but because, if not given in the first instance, it may be wholly lost; for a witness who has been examined, and has no reason to suppose that his further attendance is requisite, often departs the court and may not be found or brought back until the trial be at end. So that if evidence of this sort could be adduced on the sudden, and by surprise, without any previous intimation to the witness or to the party producing him, great injustice might be done, and in our opinion, not unfrequently would be done, both to the witness and to the party; and one of the great objects of the course of proceeding established in our courts is the prevention of surprise, as far as practicable, upon any person who may appear therein." *The Queen's Case*, 2 Brod. & B. 313, 314.

Most persons of reputable character are able, upon very short notice, to summon their friends and acquaintances to their support when they are assailed, if they have knowledge of the attack, but if they are attacked behind their backs they are altogether defenceless, and may suffer a serious injury to their reputations, and be without any means of redress. It is the right of the witness as well as of the party who has brought him into court, that he should not be placed in such a situation. For the reason, therefore, that the defendant was taken wholly by surprise by the attack made upon his witness, and that it was made in the absence of the person most interested in repelling it, and because he had no knowledge of the intended assault, and no opportunity to defend himself, justice requires that we should set aside this verdict.

Rule absolute.

C. H. Sidebotham, Esq., for plaintiffs.

Thos. Oehlschlager and Geo. H. Earle, Esqs., for defendant.

[Leg. Int., Vol. 30, p. 108.]

MULLARKEY vs. P. W. & B. RAILROAD COMPANY

A railroad company having receipted for merchandise, "to forward . . . to T. Mullarkey, Tuscaloosa, Ala." (a point beyond its line), proved the delivery of the merchandise, in good order, to the next carrier in the regular course of transportation to Tuscaloosa.

Held, that the company had fully performed its duty, and was not liable for damage occurring after such delivery.

This was an action to recover the value of eight cases of merchandise shipped over the defendant's railroad.

The plaintiff proved the value of the goods, and their delivery to the defendant, and gave in evidence a receipt, of which the material part was as follows:

"Received October 21, 1868, of Conway Bros., the following articles to forward, subject to the above conditions, marked T. Mullarkey, Tuscaloosa, Ala.," 5 cases, etc.

Plaintiff admitted the receipt of a portion of the goods, damaged by mud and water, and then closed.

Defendant then proved that the goods passed over its line to its terminus, thence over other lines with which it had "working contracts," to Norfolk, Va., where they were delivered in good order on the cars of the Norfolk & Petersburg Railroad Company; that this company was the next connecting carrier in the regular course of transportation to Tuscaloosa, the point of consignment of the goods; that defendant had no connection or contract with said Norfolk & Petersburg Railroad Company; that no freight was paid to defendant by plaintiff, but that defendant, on delivery of the goods at Norfolk, collected the freight up to that point from the Norfolk & Petersburg Railroad Company.

The jury found a verdict for the plaintiff for the difference between the value of the goods shipped and those received by him, subject to the opinion of the court on the question reserved—whether there was any contract by the defendant to deliver the goods at Tuscaloosa.

R. P. White, Esq., for plaintiffs.

A. D. Campbell, Esq., for defendants.

Opinion delivered *March 29, 1873*, by

MITCHELL, J.—The only question for consideration in this case is, whether the defendant is liable for damage to the goods accruing beyond the limits of its own line.

The general current of American decisions, contrary to the English, where a package is delivered to a carrier, addressed to a point beyond his line, is, in the absence of special contract, other than the mere address of the package, to hold the carrier liable as an insurer only to the end of his own line, and from that point, as a forwarder for safe delivery to the next carrier. 5 Am. Law Reg. N. S. 11; 2 Redfield on Railways, sec. 162 (3 Ed.); and *Gray vs. Jackson*, 51 N. H. 9, where all the authorities are very fully reviewed.

This being the general rule in the absence of express contract on the subject, *a fortiori*, a carrier is not to be held to any severer liability, where his receipt stipulates that he is "to forward" the goods only, and there

is no payment of freight or other circumstances from which the jury can infer a contract to be liable as a carrier.

Passing by the much vexed question, which does not arise in this case, how far a carrier may by express contract limit his liability upon his own line, we think it quite clear, that where he has affirmatively shown, as he has here, that there was no negligence on his part, and no damage to the goods until after they had been delivered by him as a forwarder to the next carrier on their way to their ultimate destination, he has shown a full performance of his duty, and is not liable for anything further.

The precise point of this case has not been heretofore decided in this State, but the decisions upon analogous cases would leave no doubt about it, even if it were less clear than it is upon principle.

The subject was discussed by this court in *Jenneson vs. C. & A. Railroad Co.*, 4 Am. Law Reg. 234, and the opinion of Stroud, J., was clearly indicated against the liability of the carrier, though the decision was put upon the ground of variance between the declaration and the evidence.

In *Pennsylvania R. R. Co. vs. Schwarzenberger*, 9 Wr. 208, the defendant company sold a ticket from Philadelphia to Cincinnati, and collected the full fare, but the ticket contained an express notice, that the defendant acted "only as agent for the western lines, and assumed no responsibility west of Pittsburg" (its own terminus), and it was held, that there was no contract to carry the passenger or his baggage beyond the defendant's own line.

In *B. & P. Steamboat Co. vs. Brown*, 4 P. F. Smith, 77, and *Penna. R. R. Co. vs. Berry*, 18 P. F. Smith, 272, it was held that a carrier may bind himself to carry beyond his own line, so as to become responsible for the negligence of the succeeding carriers, but as is said by Agnew, J., in the latter case (page 277), "the proof of the contract should be clear. Especially . . . when the alleged contract would contradict the papers accompanying the transaction."

Since the present case was tried, the opinion of the Supreme Court in *American Exp. Co. vs. Second Nat. Bank*, 19 P. F. Smith, 394, has been published. The receipt in that case stated the contract to be, "forward to the nearest point of destination reached by the company," subject to certain conditions. Both the receipt and the conditions expressed the restrictions of the company's duties to those of a forwarder more fully and explicitly than the receipt in the present case, but the nature of the contract is the same in both. The Supreme Court there held the express company not liable as a carrier, beyond the terminus of its own line.

In the present case, the defendant having proved the safe carriage of the packages to Norfolk, and their delivery in good condition to the next succeeding carrier in the direction of their destination, has shown performance of its duty and was entitled to a verdict. We therefore enter judgment here upon the point reserved for defendant *non obstante verdicto*.

[Leg. Int., Vol. 30, p. 108.]

WALKER *et al.* vs. GERHARD *et al.*

A right of way appurtenant to land is appurtenant to every part of it, and if the owner divides it into several tracts, the grantee of each tract, however small, has an equal right of way over the servient land.

The owner of land to which a right of way over other land is appurtenant, cannot enlarge his easement by the purchase of adjoining tracts, but the fact, that he is making an illegal or excessive use of the way in connection with the adjoining tracts, does not entitle the owner of the servient land to interrupt the way as to the original dominant land.

The remedy is by action for the illegal or excessive use of the way.

Opinion delivered *March 29, 1873*, by MITCHELL, J.

The facts were substantially as follows :

The owners of adjoining lots A and B on Sixteenth street, by mutual grants and covenants, opened an alley between the lots for the joint use and accommodation of the owners, tenants and occupiers of the said lots. The title to lot A became vested in plaintiff, Walker, who was also the owner of a lot on Ridge avenue, which adjoined lot A on the rear. Walker then altered the lines of his properties, so as to transfer a part of the rear of lot A to the Ridge avenue lot, and leased the latter thus enlarged to Jacoby, the other plaintiff, and the remnant of lot A fronting on Sixteenth street, to Reinecke, one of the defendants.

Subsequently to this division of lot A, the title to lot B came to Gerhard, the other defendant. Defendants claiming that they alone, as tenants of both lots, for whose use the alley was created, had the right to use it, and that Jacoby, one of the plaintiffs, was unlawfully using it as a way to his lot on Ridge avenue, put a gate at the entrance of the alley on Sixteenth street. Plaintiffs claimed that Jacoby had the right to use the alley to enter upon the part of his premises which had formerly been the rear end of the lot A on Sixteenth street.

In *Watson vs. Bioren*, 1 S. & R. 227, it was expressly held, that where land is conveyed with a right to the grantee to pass over other land, the right is appurtenant to all and every part of the land so conveyed, and the owner of any part, however small, is to enjoy the right of way. An examination of the facts in that case will show the severity of the rule.

The plaintiff was the owner of a lot on Chestnut street, ten feet wide by seventy-seven deep, from the rear of which a three feet alley ran out into Orphans' court. Plaintiff conveyed all of his lot to defendant, except a small strip three feet wide by thirteen long, and a glance at a map of the premises shows at once that the only use of this strip reserved was to prolong the three feet alley, so that plaintiff could get to it from a lot he owned on Chestnut street, adjoining the lot conveyed to defendant, and also from a lot on Third street, running back to this strip ; yet Chief Justice Tilghman held, that the ownership of this strip gave plaintiff a right of way through the alley, and said it would be an "intolerable grievance" in a city, if this principle were not applied, because it would force every owner of land to preserve his lot entire, in order to preserve his right of way.

This case has not been questioned, and it is conclusive in favor of plaintiff. Chief Justice Tilghman said the case did not call for a decision as to whether the person having the right of way to one lot could

make it in any way subservient to a passage to another; and the expressions of Yeates, J., appear to indicate an opinion that under some circumstances he might; but such a position could never have been even doubtful. That a right of way could not be so enlarged was expressly decided in 9 Car. 1, and in *Saunders vs. Mose*, 16 Jac. 1; reported in 1 Rolle's Abr. 391 (Tit. Chimin. Private, pl. 1, 3).

In *Kirkham vs. Sharp*, 1 Wh. 323, plaintiff recovered damages in an action on the case for the illegal use of an alley under circumstances very similar to those of the present case, and this decision has been affirmed and followed in *Lewis vs. Carstairs*, 6 Wh. 193; *Jamison vs. McCurdy*, 5 W. & S. 129; *Shroder vs. Brenneman*, 11 H. 348; and *Sharswood, J.*, in *Coleman's Appeal*, 12 P. F. Smith, 275.

It may, well be, therefore, that defendants may have an action against the plaintiff Jacoby, for an illegal or excessive use of the alley. Upon that we express no opinion, as the facts are not all before us; but it is clear that they cannot enforce their right by closing the entrance to the alley on Sixteenth street, and that is all we decide now.

Judgment for plaintiff Jacoby for \$100, as stipulated in the case stated.

Wm. Rotch Wister, Esq., for plaintiffs.

B. Franklin Fisher, Esq., for defendants.

[Leg. Int., Vol. 30, p. 116.]

CRUMP vs. GILL AND WIFE.

An assignment for the benefit of creditors does not prevent the filing of a mechanics' lien for alterations under the act of 1868.

The assignee is not a "purchaser" within the meaning of the act.

Opinion delivered April 5, 1873, by

LYND, J.—This was a *scire facias* sur mechanics' claim, filed under the act of August 1, 1868.

Defendants pleaded, "that before the filing of the claim of the plaintiff they made an assignment of all their estate for the benefit of their creditors. Without this," etc.

Plaintiff demurred.

The proviso to the act of 1868, Brightly, 1028, § 21, is: "Provided, that nothing in this act shall give a lien, or render property liable for repairs, alterations or additions as aforesaid, except from the time of filing a claim or statement of such work done or materials furnished; which claim or statement must be filed within six months after such work shall have been finished or materials furnished; but no property shall be rendered liable for repairs, alterations or additions as aforesaid, which shall have been conveyed, before any claim or statement shall have been filed, to a purchaser or purchasers thereof, by the party or parties contracting said debts."

Defendants argued that the assignment by them for the benefit of creditors was a "conveyance," and that their assignee was a "purchaser" within the meaning of the said proviso.

The cases which decide this contention against the defendants are legion. Most of these are cited in "In re Fulton's Estate," 1 P. F. S. 211.

Hence, judgment for plaintiff.

M. Arnold, Jr., Esq., for plaintiff.

J. Vaughan Darling and M. P. Henry, Esqs., for defendants.

[Leg. Int., Vol. 30, p. 116.]

BOYD *vs.* MOLE.

1. Plaintiffs upon staying their writs of *lev. fa.* paid sheriff his costs : *held*, that they could not recover this from the fund for distribution.
2. Materials furnished upon the credit of the buildings must not exceed more than could reasonably be used in their construction.
3. Houses put up in blocks of two each, there should be a lien filed against each block.

Exceptions to auditor's report. Opinion delivered April 5, 1873, by BRIGGS, J.—The allowance to Lloyd & Russell of the \$40 paid by them to the sheriff upon the occasion of their staying their writs of *levari facias* should not have been made. This allowance was claimed upon the ground that the sheriff had the right to receive said costs from the fund, and said costs having been paid to him by the claimants they were subrogated to the right of the sheriff to take them out of the fund in court. We are not aware of any act of assembly or adjudicated case conferring the right upon the sheriff to permit a party to stay his writ voluntarily, and for the sheriff in such a case to collect the costs of the defendant in the stayed writ. It is true, that a defendant is always liable to a plaintiff for such costs as may be incurred in executing the judgment. But these costs were not of that character. To hold a defendant answerable beyond this limit would subject him to the whim and caprice of an unconscionable judgment creditor, and render his entire substance liable to be exhausted in costs alone. Such a rule cannot be tolerated for a moment. This exception is therefore sustained.

Another exception also deserves notice. It is that, from the facts reported, more materials are claimed by Rufus R. Thomas as having been furnished upon the credit of the buildings than could reasonably be used in their construction.

The auditor seemed to justify the claim upon the ground that the evidence satisfied him that the claimant sold his materials upon the credit of the buildings.

This view is correct so far as to the quantity which was necessary for the erection of the buildings, whether they were used in the erection or not. But for the materials in excess of this requirement the claimant has not a lien. The vendor of the materials must have an eye to the character of the building upon the credit of which he sells his materials, and see to it that only those necessary for, and fit to be used in, the building, are charged to its account. To hold otherwise would convert the mechanics' lien law into a system of oppression, in the stead of one to encourage and secure honest dealers and builders, and subject an owner who should always retain the control of his property to a charge against it, possibly for more than the value of the ground and building erected upon it. *Dickinson College vs. Church*, 1 W. & S. 466; *Harland vs. Rand*, 3 C. 511; *Odd Fellows' Hall vs. Masser*, 12 H. 507. This claimant was quite negligent, indeed, so much so, that it may be doubted whether he did not sell his materials more upon the credit of the defendant than of the buildings, for the auditor reports him as testifying, "that he did not know what kind of houses were being built . . . nor their size, nor how much materials of his they would require, until they were finished, and that he had unlimited confidence in Mole (the de-

fendant). Also, that he recognized some of his work sent to Powelton avenue (the buildings in question) in other buildings erected by J. M. Mole. This he saw since the sale of the houses in question."

This indifference establishes the fact that he took no precaution to discover whether his materials, either as to quantity or quality, were required for the buildings—a precaution he must be held to before allowing him to take the fund, as against the other lien creditors, in excess of the value and fitness of the materials necessary to be used in the buildings.

This exception is also sustained.

The exceptant, at the argument, pressed with much earnestness another exception, to wit, that an apportioned claim against the four houses on Powelton avenue would not lie. The report shows that the four houses were erected in two blocks of two houses in each block; that one block was in course of erection before the defendant had acquired title to the land upon which he erected the other block, and that the first block was under roof before the second was commenced.

The report also shows that the materials in the lien mentioned were not furnished under one general contract, but purchased from time to time as required.

The auditor, nevertheless, concludes, that the lien was properly apportioned against the four houses. The facts he reports scarcely support his conclusion. It is a misapprehension to suppose that an apportioned claim lies simply because the houses adjoin. The act of March 30, 1831, conferring the right to file an apportioned claim, puts it upon the ground, that when "several houses and buildings adjoining each other are erected by the same owner, so that it is impossible for the person who has furnished and provided materials for the same to specify, in the claim filed, the particular house or other building for which the several items of his demand were so furnished and provided," the claim may be apportioned against the several houses. The logic of the court in *Young vs. Chambers*, 3 H. 267, is to the same effect. It held "that a joint claim might be filed against houses put up *together*, because it might not be in the power of the claimant to discriminate. . . . The word building, in every act upon the subject, was strictly applicable to a block, which, though composed of separate houses, was put up as a whole; but it could not be predicated of separate blocks, in different streets, which could in no respect be viewed as entire." Though these four houses adjoin they were not put up together, nor as a whole, but as before stated, in separate blocks. The impossibility of specification adverted to in the act of 1831, and in *Young vs. Taylor*, did not exist in this case, and hence the claimant should, in conformity to law, and in justice to other lien claimants, have filed two claims, instead of blending the four houses into one. *Thorn vs. Shaw*, 5 Leg. & Ins. 19.

These views are based upon the facts reported by the auditor, but as the case must go back to him, we do not direct him to reject the claim, but remit it to him to hear such additional evidence as the parties may produce before him, and after he shall have done so, to report to the court the facts he shall extract therefrom.

The other exceptions are dismissed.

J. S. Powell and Erastus Poulson, Esqs., for exception.

[Leg. Int., Vol. 30, p. 140.]

TOWNSEND vs. ROY.

1. A purchaser at an Orphans' Court sale in partition, paid, by leave of court only so much of the purchase-money as was not distributable to himself and three others, whom he represented: *Held*, if there were a resulting trust in favor of the persons so represented, it should be asserted by them in the appropriate mode, and within the time limited by the act of April 22, 1856.
2. A defendant in ejectment may set up an outstanding title in a third person, but it must be an outstanding legal title. That the plaintiff holds the legal title in trust for a third person cannot avail the defendant.
3. One who recovers in ejectment claiming the *whole* estate, cannot set up the record as evidence, that he is in possession as *cestui que trust* for an undivided portion, and thereby escape the operation of the act of 1856.

Rule for new trial, and motion for judgment upon a point reserved.
Opinion delivered April 26, 1873, by

LYND, J.—This was an ejectment. The title of the plaintiff was under a sale in partition in the Orphans' Court of the estate of Michael Roy, deceased. The proceedings were regular and usual, except that the purchaser, instead of paying to the trustee appointed by the court to make the sale and conveyance the entire purchase-money, paid, by leave of court, so much of said sum as was not distributable to himself and three other heirs of Michael Roy, deceased, whom, as was alleged, he represented.

The defendant maintained that as to these three heirs, each of whom was entitled to one-seventh, there was a resulting trust, and that the verdict should have been in favor of the plaintiff for an undivided four-sevenths only of the premises.

We are of opinion that the purchaser took, by the sale, a *legal* title to the whole property, and any resulting trust for other parties must be asserted by them in the appropriate mode, and within the time limited by the act of April 22, 1856.

A defendant in ejectment may set up an outstanding title in a *third* person, but it must be an outstanding *legal* title. That the plaintiff holds the legal title in trust for such third person certainly could not avail the defendant.

But the defendant happens to be one of the three heirs, whom the purchaser, at the sale in partition, claimed to represent as above stated, and he maintains that he can set up, at least, his own equitable title to the one-seventh of the said property; and hence, that the verdict for the plaintiff should, at most, have been for an undivided six-sevenths.

Unfortunately for this position of the defendant, his own evidence discloses that he came into possession of the premises by proceedings in ejectment, commenced on the twenty-third day of March, A. D. 1864, in which he claimed the *whole* premises.

But the deed in partition was delivered and recorded June 14, 1853, and the resulting trust in favor of defendant could not, therefore, under the provisions of the act of 1856, be enforced after the 22d day of April, 1858. *Prima facie*, therefore, the ejectment commenced in 1864 was too late; the record was not of itself evidence that the action was to enforce

the said resulting trust, nor that the possession acquired under said action was acquired in pursuance of said trust.

On the contrary, as he claimed the *whole* premises, when the resulting trust in his favor was as to one-seventh only, it is evident from the record that his action was *not* brought to enforce the resulting trust.

Upon all the evidence, then, the defendant is not a *cestui que trust* in possession; his possession is that of a mere stranger, and he must yield to the plaintiff's legal title.

At the trial, the question as to whether there was a resulting trust in favor of the defendant was reserved. The views just expressed show that the reservation was immaterial. Hence, the motion for judgment upon the point reserved is dismissed, and the rule for a new trial is discharged.

Charles W. Katz, Esq., for plaintiff.

Parsons, Esq., for defendant.

[Leg. Int., Vol. 30, p. 148.]

COMMONWEALTH TO USE *vs.* CLAY, *Administrator.*

A surety in a *capias* bond is not liable where the judgment is entered by agreement against one only of the defendants in the original suit, and the judgment being in effect converted into a contract to deliver stock.

Opinion delivered May 3, 1873, by

HARE, P. J.—This was an action on a bail bond against Joseph A. Clay, as administrator of Robert P. King, one of the obligors. George N. Townsend and Samuel Townsend were the principals in the bond, and Robert P. King and Joseph T. Rowand, sureties. The material clause is as follows:

“Whereas, the said George N. Townsend and Samuel Townsend have been arrested on a *capias ad respondendum*, issued out of the Supreme Court for the Eastern District of Pennsylvania, in a certain action, trespass on the case (conspiracy), at the suit of Charles H. Buckley: Now, the condition of this obligation is such, that if the said George N. Townsend and Samuel Townsend shall be condemned in the said action at the suit of the plaintiff, that they shall satisfy the condemnation money and costs, or surrender themselves into the custody of the sheriff of the said city and county of Philadelphia, or in default thereof, that the above bounden Robert P. King and Joseph T. Rowand will do so for them, then this obligation to be void; otherwise to be in full force and effect.”

The plaintiff gave the record of the former suit in evidence, which showed that he had accepted a confession of judgment from George N. Townsend, in the following terms:

BUCKLEY *vs.* TOWNSEND.

Supreme Court, July Term, 1868, 107.

It is agreed in the above case that judgment be entered against George N. Townsend, one of said defendants, and that the damages be assessed as follows, viz.:

Amount deposited with defendants by plaintiff, July 7, 1867.....	\$1,736 00
Interest to June 7, 1870.	303 68
Amount do., per Mr. Geyer for plaintiff, September 6, 1867.....	500 00
Interest, 2 years 9 months.....	82 50
	<hr/>
	\$2,622 18
\$10,000 in bonds of Susquehanna Lumber Company (less 4 per cent. off).....	\$9,600 00
Interest as per that date.....	1,440 00
	<hr/>
	\$13,662 18

It is agreed, however, that upon the return to plaintiff of said stock, that the above value thereof shall be credited on said judgment for said amount.

GEORGE N. TOWNSEND.

JOHN A. OWENS, *Attorney for plaintiff.*

I directed the jury to find a verdict for the plaintiff, and reserved the law for the consideration of the court in banc.

The statement of the case is enough to show that the plaintiff cannot maintain the action. The event on which the defendant's intestate agreed to be answerable has not occurred. His agreement was, that if the defendants in the original proceeding were condemned, they would surrender themselves or pay the condemnation money and costs, and if they did not, that he would pay it for them. A judgment against one of the defendants was not in accordance with this stipulation. The difference is not merely one of form. If the plaintiff had proceeded to judgment against George N. and Samuel Townsend, the latter might have satisfied the debt; if he made default, the sureties would have had an action over against him. By the course actually taken, he was discharged from all further liability; and this on well-established principles exonerated the sureties. Moreover, the confession of judgment varied the nature of the obligation. A demand sounding in damages, to be liquidated by the jury, in the lawful money of the commonwealth, was converted into a contract to deliver stock. It is settled, that if the liability, which the surety has assumed, be altered in any material particular, without his consent, he will be discharged. Judgment is accordingly entered for the defendant on the point reserved.

During the argument on the motion for a new trial, the plaintiff asked for leave to discontinue on payment of costs. Such a request comes too late after the verdict. *Kennedy vs. McNickle*, 7 Phila. R. 217. It has been ingeniously suggested, that we may set the verdict aside, and then grant the motion. This would be an evasion of a rule which is essential to the due administration of justice. That the verdict is in the plaintiff's favor, does not render it his property. The defendant may have an interest in maintaining it as a decisive and irrevocable step towards the determination of the cause. It should not, therefore, be abrogated without his consent. The matter is, moreover, one in which the public have an interest that is not less real for being indirect. It is the duty of the court to see that the Commonwealth be not prejudiced by the renewal of a controversy which is virtually closed. We should reach this conclusion with some reluctance if it could hinder the plaintiff in the assertion of any legal right. But it is very clear that if he should succeed in obtaining judgment against the principal debtors,

the failure of this suit will not prevent a recovery against the bail. All that our decision establishes is, that the plaintiff is not entitled to recover as the matter stands at present; it does not and cannot preclude any cause of action that may arise hereafter.

Charles H. Sidebotham, Esq., for plaintiff.

Harry T. Kingston and Samuel C. Perkins, Esqs., for defendants.

[Leg. Int., Vol. 30, p. 160.]

HAUBERT vs. HAWORTH.

In an action for not entering satisfaction on a mortgage, the jury may, and should consider whether the refusal to satisfy the mortgage was wanton and oppressive or the result of an honest doubt.

Opinion delivered May 3, 1873, by

HARE, P. J.—This was an action against the defendant for not entering satisfaction on a mortgage when thereto requested, in accordance with the provisions of the act of assembly. The defendant pleaded payment, and for a further plea, that “since the filing of his, the said defendant’s plea, the said plaintiff, on October 30, 1867, agreed in writing with him, the said defendant, that the issue and questions arising in this suit should be settled and determined by the final judgment in a suit then depending between him, the said plaintiff, and the said defendant, in this court, instituted to March term, 1870, and No. 770, and this the defendant is ready to verify.”

The issue arising under the plea of payment was submitted to the jury and found for the plaintiff, but a verdict was rendered against him on the special plea; it appearing from the evidence that the parties had entered into the alleged agreement. The only point for our consideration is, whether the second plea is a good answer to the declaration. If it is, the defendant must have judgment on the record as a whole, notwithstanding his failure in the other issue.

The question is not free from difficulty. The plea does not allege that the suit of March 7, 1870, No. 770, has been prosecuted to judgment. In general “the pendency of another suit is pleadable only in abatement, and material only when pleaded.” *The Commonwealth vs. Cope*, 9 Wright, 161. The defendant must object at once if he means to object at all. If he lies by, the privilege is gone, and he must then base his defence on the merits. But the case is obviously different when the parties agree that the questions and issues in one suit shall be “settled and determined by the final judgment” in another. Such a stipulation comes too late to be pleaded in abatement, and can only be made effectual through a plea in bar. It cannot be said to contravene any legal rule or principle. On the contrary, the presumption is in its favor as tending to narrow the field of litigation. If there be any reason why it should not be enforced, it should be shown by way of exception.

It was alleged during the argument that the suit referred to in the agreement was a *sci. fa.* on the mortgage against the now plaintiff, which has been determined in his favor. It could not, therefore, as he contended, have been his intention to merge the present suit in that pro-

ceeding. What the parties really intended was, that the suit should be suspended to await the result of the *scire facias*. And the judgment which had been entered in favor of the mortgagee was conclusive of his right to the penalty claimed in this proceeding.

If this argument were logically sound it would still fail for want of premises. There is nothing on the face of the pleadings to indicate that the *scire facias* is still pending and undetermined.

It is a legal as well as natural presumption that things continue in the same condition. If there is a change it must be alleged and proved by those who rely upon it. The plaintiff should have replied averring that judgment had been given in his favor on the *scire facias*. It is immaterial that this was proved indisputably before the jury. What took place there forms no part of the record, and would not go with it to the court above. It is well settled that the evidence given under one plea will not aid the defects of another. As the matter now stands, we must presume that the plaintiff went to trial prematurely in violation of the agreement.

If the plaintiff could obviate this objection by presenting the case in a different form, we should be loath to decide against him on a ground that may appear to be merely technical. But, it seems to us that it was the true intent and meaning of the agreement that the result of the *scire facias* should be conclusive of the whole controversy. Its language is, that "the issues and questions arising in this suit shall be settled and determined by the final judgment in a suit then depending between him, the said plaintiff, and said defendant, in this court, instituted to March term, 1870." To settle, as applied to a suit, is synonymous with pay, satisfy, or close. The customary entry on the trial list when the parties have agreed to put an end to the controversy is, "settled" or "settled and ended."

It has never been doubted that such an entry may be pleaded in bar to another suit. If such was not the sense of the agreement in this instance, it was an inconsiderate one on the part of the now defendant, which insured heavy damages if he failed in the *scire facias*. The act of assembly has two objects: one to enable a mortgagor who has satisfied the debt to get rid of the lien; the other, to afford him compensation if it has been wrongfully kept on the record. In arriving at a conclusion on the latter head the jury may and should consider whether the refusal to satisfy the mortgage was wanton and oppressive, or the result of an honest doubt. The allegation that the bond was paid may be substantiated by proof, without euitling the plaintiff, to more than nominal damages. The money may have been given to an agent, who denied the fact, or it may have been lost in passing to the mortgagee, as seems to have been the case in this instance. If such a question comes as a whole before the jury—if they are permitted to hear all the evidence that can throw light on motive—they may decide in favor of the mortgage debtor without inflicting a penalty on the creditor. The effect of the agreement as interpreted by the plaintiff was to leave the question of right to one set of men, and that of damages to another. The jury in the present suit were compelled to accept the payment of the mortgage as established by the verdict of the former jury. Starting from this basis they could not but regard the defendant's refusal to enter

satisfaction as a wilful wrong. They could not see, as they might have otherwise done, that on the question, whether the debt had been paid, the evidence was so nearly balanced that a candid mind would have hesitated in arriving at a conclusion.

It results from what has been said that the literal meaning of the agreement is neither unreasonable nor unjust. It should not, therefore, be abandoned for an artificial interpretation not tending to further any good or useful purpose. Judgment is entered on the verdict for the defendant.

[Leg. Int., Vol. 30, p. 192.]

EMERY vs. PATTON.

Audita querela may be issued after refusal of summary relief on motion.

It is a writ of right, but lies only for matters occurring after judgment, or which the party has not had opportunity of pleading.

It will not lie to show that a judgment confessed was to be collateral security only.

It is not a *supersedeas* of plaintiff's execution, unless so allowed, and the court will not make such order, unless justice require it.

Petition and rule for an *audita querela*. Opinion delivered June 7, 1873, by

MITCHELL, J.—If there is any case in which the writ of *audita querela* is useful in Pennsylvania at the present day, it has failed to suggest itself to me after a very deliberate consideration of the subject in this case. In England, when, on application for summary relief on motion, it appears by the depositions or otherwise that the facts on which relief is asked are disputed or doubtful, it is the practice to refuse the motion and put the party to his *audita querela*. *Baker vs. Ridgway*, 2 Bing. 41. Hence this remedy has been revived and more frequently used of late than it had been during the previous century. But as it is the settled practice of courts in this State to relieve upon motion, and to grant an issue in such cases, the same reason does not exist for encouraging the use of an antiquated and cumbersome remedy here.

It is too late, however, to question in this court that the writ may issue even after an unsuccessful application for relief on motion. More than twenty years ago the court reluctantly considered itself bound by the precedents on this point: *Schott vs. McFarland*, 1 Phila. R. 58; and since then the writ has been issued at least three times. *Fox vs. Gordon*, J. 1862, No. 652; *Reinoel vs. Gordon*, S. 62, No. 325; *Jones vs. McMullen*, D. S. B., J. 65, No. 124.

It is settled that the writ is of common right, but all the authorities show that is not of itself a *supersedeas* of execution, and that the *supersedeas* must be moved for and allowed separately. How far such an order is of course is not perhaps entirely clear on the authorities. It must be conceded that in nearly all the earlier cases the *supersedeas* has been allowed, but this fact is not of much weight, as a very cursory examination of this title in Fitzherbert Nat. Brev., or Rolle's Abr., will show that the cases were such as would receive immediate and summary relief on motion in any common law court at the present day. And there is sufficient authority for refusing a *supersedeas* where justice does not require it.

Thus in Brooke's Abr. Aud. Quer. 22, it is said, if a man be non-suited in *audita querela* then he may have another *audita querela*, but not a *supersedeas*, as on the first writ.

So in *Nuby vs. Jenkins*, 1 Sid. 351, there was judgment in replevin and a release by one of the avowants, and the court was moved to allow the writ to the intent that the execution should be superseded. And a release was produced, but the witnesses being *in pais* an affidavit was offered to prove their hands, but the court would not allow it, as no witness to the release was present to prove it. It appeared that the release was given without the consent of the other avowants, and Wyndham said, "this was only an equitable writ, and therefore not to be allowed without equity."

Again, in *Langston vs. Grant*, 1 Salk. 92, it is said, "*audita querela* is no *supersedeas*," and this is cited by Sergeant Williams without dissent. 2 Wms. Saund. 148e.

In *Anon.*, 12 Moa. 105, Holt, C. J., says, "*audita querela* is no *supersedeas* in itself, but a party may go on with his execution until there be a special *supersedeas*, and though *audita querela* be allowed, no *supersedeas* shall be granted until the matter whereupon the *audita querela* is grounded be proved by two witnesses."

And in *Waddington vs. Vredenburg*, 2 Johns. Cases, 227, it is said by Radcliff, J., in delivering the opinion of the court, "the granting of a *supersedeas* being in the discretion of the court, we are of opinion that, under the circumstances of this case, it ought not to be allowed."

These authorities are sufficient to show that a *supersedeas* is not a matter of right, and it is plain that considerations of equity and convenience should prevent the court from ordering a *supersedeas*, except where the interests of justice require it.

But though the writ is of common right in a proper case, yet all the authorities agree that it will only be allowed upon matters of defence arising since judgment, or which the party has had no opportunity to plead. The foundation of the writ is the fact that the defendant has had no day in court to plead the defence alleged. Where the party could have pleaded the release and has passed his time, he shall not be aided by *audita querela*. 48 Ed. III. 20; Rolle's Abr. Aud. Qu., C. 1; 3 Blackst. 405-6.

The grounds of relief set forth in the petition in the present case are four. First, that the judgment and the bond on which it is founded were given as collateral security only for the sum of \$1127, due to plaintiff by one John B. Brown. Second, that in June, 1870, after entry of judgment, plaintiff accepted from Brown on account of this debt, a horse and wagon, of the value of \$450. Third, that the lien of the mortgage accompanying the bond was discharged by judicial sale of the premises in the summer of 1870, and that plaintiff agreed to satisfy this judgment, but fraudulently refused to do so. Fourth, that the debt secured by this judgment was paid in April, 1872, by an agreement to apply the sum of \$1196, received by plaintiff from Joseph Patton & Brother to that purpose.

With regard to the first ground it is sufficient that it did not arise after judgment. It was a defence to the mortgage *pro tanto* at the moment of its making, and could have been pleaded to a *scire*

facias. By giving a warrant of attorney to confess judgment defendant waived his day in court, as much as if he had been summoned and made default, and he cannot thereafter have *audita querela*. 48 E. III. 20; Rolle's Abr. Aud. Qu., C. 2. For the purposes of this proceeding therefore the judgment must be taken as a debt absolute of record for \$1800, and the writ must be refused unless the first ground be struck out of the petition.

The other grounds laid in the petition are matters arising subsequent to the judgment, and are therefore proper foundation for the writ. They are, however, utterly inconsistent with each other, and so far as the depositions before us bore upon them, we did not think they made a sufficient case *prima facie* to warrant us in opening the judgment and ordering an issue to determine whether anything was due upon it.

If the petition is amended by striking out the first ground for relief, the writ of *audita querela* will be awarded, but it will not be made a *supersedeas* of the plaintiff's execution. We are the less reluctant to refuse this relief because the whole testimony shows a question of balances resulting from separate and apparently complicated transactions, one of a class of cases that can never be satisfactorily tried before a jury. The plaintiff has a far more complete, effective, and convenient remedy by a bill in equity for an account.

Rule discharged.

Geo. S. Graham, Esq., for the rule.

Franklin Swayne, Esq., contra.

[Leg. Int., Vol. 30, p. 216.]

KRAUSE vs. STILES.

1. The mode in which an auditor may obtain an allowance of an extra compensation under the act of April 14, 1870.
2. The costs allowed Prothonotary District Court on distribution of fund in court.

Exceptions to auditor's report. Opinion delivered June 27, 1873, by MITCHELL, J.—The first three exceptions are not sustained, and are sufficiently answered by the authorities cited by the auditor. There remain, however, exceptions to the auditor's fee and to the prothonotary's claim for costs which are proper to be noticed.

I. By the act of April 14, 1870, a regular schedule of fees is established for auditors in this county, but the court is authorized "in important cases or cause shown" to allow "such additional compensation as they may deem proper."

In the opinion of this court the proper practice to be pursued under this act by an auditor who desires the allowance of such additional compensation, is to complete his report as far as the table of distribution, and then to submit the report with a statement of his fee, calculated on the regular charges of the act, and a suggestion of what further allowance is deemed reasonable by himself or by the counsel before him. Having thus before it the facts by which to judge of the extent and difficulty of the auditor's labors the court will be enabled to comply with the spirit as well as the letter of the act of assembly.

The regular fee in this case would be \$17.50. But one meeting was held, as the facts were nearly all proved by record or other written

evidence. But on the facts, four or five questions of law, some of them of considerable nicety, arose, and had to be decided by the auditor. To these questions the auditor gave not only time and labor, but professional skill, which, as the result of past labor, is also a subject of compensation. We think, therefore, that this is a proper case for the exercise of the discretion given to the court by the act of 1870, and though it would have been preferable to have submitted the question of the fee to the court in the first instance, yet as the amount charged, \$50, is not unreasonable for the services performed, we will not now change it.

II. The remaining exception is to the sum of \$9.12, awarded by the auditor to the prothonotary for his commissions and costs.

A careful examination has failed to show any ground for this exception. The only item of any importance about which a doubt could exist is the charge of \$2.10 for recording the auditor's report.

By the act of April 25, 1850, the prothonotaries of the various Courts of Common Pleas and District Courts are required to record in books provided for that purpose, "all accounts of assignees, trustees, sequestrators and committees, and all reports of auditors thereon. . . . And all reports of distributions or appropriations made by the various sheriffs of the Commonwealth, and filed in their offices respectively." It will be seen that this act does not in terms include reports of auditors upon the distribution of moneys paid into court as the proceeds of execution; but a fair and liberal construction of the act would seem to make it necessary that such reports should be included. The scope of the act would seem to be that all accounts of the administration and distribution of money, and also all auditors' reports, should be recorded. Sec. 18 provides for the recording of all auditors' reports in the Orphans' Courts; and sec. 19 follows in the language I have already quoted. If the words "reports of distributions or appropriations made by the sheriff" meant to require a record of every distribution made by the sheriff of the proceeds of a writ, it is impossible to suppose the Legislature meant to leave unrecorded the most important cases of all—those, namely, in which there was a contest for the fund. The fair construction of these words, therefore, is, that they were meant to describe just such cases as this, and to require the recording of this auditor's report. Such has been the uniform practice in this court since the passage of the act.

Assuming then, that the charge for recording is legally made, is the amount charged correct? By the act of 1850, the prothonotary is to charge one-half the fees allowed to the recorder of deeds. Since the argument of this case the words of the auditor's report have been counted three separate times—once by the prothonotary's counsel, once by myself, and once by another person by my direction, and the maximum discrepancy in the prothonotary's fee by the three counts is 13 cents—a discrepancy easily accounted for by the variation in counting dates and amounts, as words, when expressed in arabic numerals. As the prothonotary's count was the intermediate one of the three, it was probably the most correct.

By the act of April 2, 1868, sec. 3. (P. L. 5), "the fees to be received by the several prothonotaries of the Courts of Common Pleas and of the District Courts of this Commonwealth" were materially raised, for some of the services performed by the prothonotary in this case. When that act was passed there were no District Courts in existence in

the Commonwealth except those of Philadelphia and Allegheny counties, yet at the end of the act is a proviso, that it shall not apply to certain counties named, including Allegheny and Philadelphia. There is thus a latent repugnancy or incompatibility in the parts of the act, and probably the true intent would be best reached by limiting the operation of the proviso to the sheriff, recorder, and other officers named in the act, and holding that the express mention of the District Courts must override the proviso as to the prothonotary. But it is not necessary to do this, as the prothonotary of this court has never claimed to charge by the rates fixed in this act, and I have referred to it only to show the carefulness and accuracy of that officer, who, in a case of doubt, has charged the smaller fee, and to observe in this connection that it is very much to be regretted, for the interests of the prothonotary, and of those who have business with him, that the Legislature does not make a simple, intelligent, and intelligible fee bill.

Exceptions dismissed.

J. W. Hunsicker, Esq., for plaintiff in the execution.

D. Weatherly, Jr., Esq., for the landlord.

J. H. Gendell, Esq., for plaintiff in the attachment.

[Leg. Int., Vol. 30, p. 224.]

THE UNION NATIONAL BANK *vs.* CHAMBERS & CATTELL.

1. In an action to recover back money paid upon a forged bill or forged indorsement, it is in general no defence that the person paying was negligent in not detecting the forgery. What the relative rights of the parties would have been, if the person receiving the money had been a mere agent for collection, and had paid it over to his principal before notice, not decided in this case.
2. The act of 5th April, 1849, Purdon, 159, commented on.

Rule for a new trial. Opinion delivered *July 5, 1873*, by

THAYER, J.—A person calling himself “M. R. Rizer, of the firm of M. R. Rizer & Brother,” and who had been introduced under that name to the defendants, bought a bill of goods of them on the 15th of October, 1868, amounting to \$258.50. About nine o'clock on the morning of the next day, Rizer came for his bill, and presented in payment a draft for \$2000, drawn by W. C. Graves, cashier of the First National Bank of Warsaw, Indiana, on the Union National Bank of Philadelphia, the plaintiffs in this action, and payable to the order of C. N. Jordan, cashier of the Third National Bank of New York. The draft, when offered to the defendants by Rizer, purported to be indorsed by C. N. Jordan, cashier, to the order of M. R. Rizer & Brother. The defendants took the draft (Rizer indorsing it “M. R. Rizer & Brother”), and gave Rizer a check on the Union National Bank for \$1741.50, the difference between the draft and the bill of goods which he had purchased. After the defendants had received the draft and Rizer had gone away, the defendants sent the draft to the Union Bank by their bookkeeper. The bookkeeper showed it to the paying-teller, and asked if it was good. The paying-teller said it was good. At the same time he turned the draft over and saw the indorsement “M. R. Rizer & Brother.” He then asked the defendants’ bookkeeper if he knew that signature, and he replied that they would take care of that. The paying-teller testifies that he did not look at

Jordan's signature at all, that his attention was not called to it. At a later hour in the day, the defendants indorsed the draft and deposited it to their credit with the plaintiffs. Subsequently they drew out of the bank, upon their check, the amount thus accredited to them (\$1741.50 being drawn out by Rizer upon the check which the defendant had given him in exchange for the draft). The draft was a genuine draft, but it turned out that the indorsement of Jordan, the payee, was forged. The plaintiffs brought this action to recover the amount of the draft which they had credited to defendants, and paid out upon their checks.

The defendants resisted the action upon two grounds: 1st. That the plaintiffs had been guilty of negligence in taking the draft; and second, that they had wrongfully paid the check for \$1741.50, the person to whom it was paid not being M. R. Rizer, and the indorsement "M. R. Rizer & Brother," on the check, being consequently a forgery. The court instructed the jury that there was no proof of such negligence on the part of the bank in receiving the draft as would exonerate the defendants from liability, and that the indorsement of the draft by the defendants was a warranty of the genuineness of all prior indorsements. On the second point of the defence, the court instructed the jury that if the person who indorsed the check was not M. R. Rizer, then the indorsement "M. R. Rizer & Brother," was also a forgery, and the plaintiffs had paid it without a proper indorsement, and could not charge the defendants with it. The jury found a verdict for the plaintiffs.

To prove negligence on the part of the plaintiffs, the defendants relied upon proof tending to show that it was not usual for drafts drawn by one bank upon another, and payable to a third bank, to get into private hands. That it was usual for the cashiers of the New York banks, in indorsing such drafts, to use a printing stamp in affixing the words of transfer, whereas the words of transfer on this draft were not so affixed, but were written. They also alleged that the paying-teller of the bank was negligent in saying that the draft was good when it was shown to him, and that they would not have deposited it but for that declaration. With regard to this last point, it is to be remarked that at the time the draft was shown to the paying-teller, the defendants had already taken it from Rizer, and given him their check for the difference, and that the paying-teller was not questioned in regard to the genuineness of the signature of the New York cashier. Nor was his attention particularly called to it. The draft was shown to him and he said it was good, the natural import of which was, that the drawer had a right to draw, and that the money was there to pay it. It is not the duty of the paying-teller to conduct the correspondence of the bank. If the defendants had desired to assure themselves of the genuineness of the indorsement, they should have taken it to the cashier, and called his attention particularly to it before they consented to receive it. Its being shown to the paying-teller after the defendants had received it, and when they were on the point of depositing it, can have no more effect than if they had then presented it to the paying-teller for payment and he had paid it, in which case it cannot be doubted that the plaintiffs might have recovered the money back. The defendants did nothing upon the faith of what was said by the paying-teller, except to deposit it.

Neither was the fact that such drafts are ordinarily used as remit-

tances by one bank to another evidence of such negligence on the part of the plaintiffs as will preclude their recovery. The defendants' own witness testified that such drafts sometimes get into private hands, and the defendants themselves vouched for the regularity of its negotiation by their own indorsement. With what propriety can they say that the plaintiffs ought to have known that this draft was not in proper hands, when those hands were their own, and when they guaranteed their right to its possession by their own indorsement?

The act of 5th April, 1849, Purdon, 159, enacts that wherever any value shall be received as a consideration for or in payment of any bill of exchange, draft, check, promissory note, or other negotiable instrument, by the holder thereof, from the indorsee or payer of the same, and the signature of any person represented to be a party thereto, whether as drawer, acceptor or indorser, shall have been forged thereon, and such value by reason thereof erroneously given or paid, such indorsee or payer respectively shall be entitled to recover back from the person previously holding or negotiating the same, the amount so as aforesaid given or paid by such indorsee or payer to such person, with lawful interest thereon from the time of demand and repayment.

The object of this law was to provide a remedy against a payment by mistake upon a fraudulent signature, whether the mistake arose from negligence or not. It was deemed inequitable that the payee should under such circumstances retain the money. The dictum in *Rick vs. Kelly*, 6 Casey, 530, that the act was only declaratory of the existing law, has been overruled.

That the act was more than declaratory of the existing law was distinctly ruled in the *Tradesman's Bank vs. The Third National Bank*, 16 Smith, 435, where it was decided that the rule laid down in *Levy vs. Bank of the United States*, 1 Binn. 27, that the acceptor of a forged bill must pay it, because it is his duty to know the drawer's handwriting, and is precluded from disputing it, has been overturned by this act of assembly. *The Tradesman's Bank vs. The Third National Bank* was expressly ruled upon that ground and no other. It may be observed, also, that in that case the judgment was entered for want of a sufficient affidavit of defence, in which affidavit it was expressly charged that the holders were innocent holders, and that the plaintiffs had not used proper diligence in paying a draft upon themselves, in which the drawer's signature was forged. But this was held to be of no avail against the act of assembly, although it was a perfect defence under *Levy vs. The Bank*. It follows that want of care or negligence in paying a forged bill will not alone, since the act of 1849, preclude the payer from recovering back the money, and this disposes of so much of the defence as was founded in the alleged negligence of the plaintiffs in this case.

The other branch of the defence was left to the jury, with an instruction which was quite as favorable to the defendants as they were entitled to demand. The jury were told that if the person who indorsed the check for \$1741.50, with the name of "M. R. Rizer & Brother," was not M. R. Rizer, but another person, who forged that indorsement, then the check was wrongfully paid, and the plaintiffs could not charge the defendants with it. It may admit of doubt whether, if the check was paid to the person to whom the drawer of it intended it should be

paid, it was wrongfully paid, although the holder was not in truth M. R. Rizer, and did not belong to any such firm as M. R. Rizer & Brother. But the defendants cannot complain of an instruction which was altogether in their favor. Much stress was laid in the argument upon the fact that the plaintiffs had alleged in their bill of particulars, that the indorsement of "M. R. Rizer & Brother," upon the *draft* which the defendants deposited with the plaintiffs, was forged, as well as the indorsement of Jordan, the cashier; and it was argued that if, as alleged in the bill of particulars, the indorsement of "M. R. Rizer & Brother" upon the draft was forged, the same indorsement on the check must also have been forged, as it was clear that it had been made by the same person. The point relative to the bill of particulars was a point which possibly might have had some effect upon the jury if it had occurred to the defendants' counsel to make it there. It was not made there. Indeed, it was not made upon the trial at all, but was an afterthought. If it had been made upon the trial the plaintiff might have amended his bill of particulars. The defendants did not even put the bill of particulars in evidence, and made no point of it at all upon the trial, either to the court or the jury.

Rule discharged.

Chas. Gilpin, Esq., for plaintiff.

E. Spencer Miller, Esq., for defendant.

[Leg. Int., Vol. 30, p. 224.]

MACHETTE vs. LESSIG.

Where the plaintiff's statements as a witness were corroborated to a certain extent by papers which he produced, signed by the defendant, and the defendant was not examined himself, and offered no evidence, the jury having found a verdict for the defendant, a new trial was ordered.

Opinion delivered *July 5, 1873*, by

THAYER, J.—The action was *assumpsit* for money paid for the use of the defendant and at his request. The plaintiff proved that the defendant made an application to the plaintiff, who was general agent of "The Mutual Benefit Life Insurance Co.," for a policy on his life, that the risk was accepted by the company, and a policy duly executed by the company and sent to the plaintiff, who left it at the office of the gentleman where the plaintiff's application had been drawn up and signed. The original application was produced, signed by the defendant, together with the accompanying papers, including what is called the demand note or order on the dividends, also signed by the defendant. The plaintiff testified that he had himself paid for the defendant the cash premium upon the policy, at the defendant's request, and that he had agreed to reimburse him within sixty days. The action was brought to recover this payment. The defendant offered no evidence. It appeared that shortly after the application was made for the policy he had removed to Colorado. His counsel rested his case upon the improbability of the plaintiff's statements, and some alleged discrepancies in them. The jury found a verdict for the defendant.

The plaintiff's evidence was to a certain extent corroborated by the papers which he produced, and in the absence of any counter-statements

upon oath by the defendant himself, and of any attempt to impeach the plaintiff's character for veracity, he ought not to have been disbelieved by the jury. We think, therefore, that justice will be promoted by ordering a new trial.

Rule absolute.

M. Hampton Todd, Esq., for plaintiff.

Chas. Gilpin, Esq., for defendant.

[Leg. Int., Vol. 30, p. 224.]

CORN EXCHANGE NAT. BANK *vs.* NAT. BANK OF THE REPUBLIC.

The act of April 5, 1849, relative to the recovery of money paid on a forged instrument, was not intended to relieve a bank from the consequences of negligence in paying a forged check of a depositor, where the party receiving the money has, before notice of the forgery, innocently changed his condition on the faith of the bank's action.

Rule for a new trial.

On Saturday, June 1, 1872, one T. M. Simpson opened an account with the defendant, by depositing a check for \$2000 purporting to be drawn by Wm. A. Simpson & Son, on the plaintiff, to the order of T. M. Simpson, the depositor, who was known to the officers of defendant as a son of Wm. A. Simpson.

On Monday, June 3, between 9 and 10 o'clock, this check came through the clearing house to plaintiff, by whose paying-teller it was examined and passed to the bookkeeper, who entered it in the usual way in the account of Wm. A. Simpson & Son.

On the same day, Monday, about 2 o'clock, T. M. Simpson presented to the defendant his own check for \$1800. The paying-teller took the check to the bookkeeper and both together examined the account, found the \$2000 to the depositor's credit, and thereupon paid the check.

On the next day, Tuesday, one of the firm of Wm. A. Simpson & Son came to plaintiff and stated his suspicion that there was something wrong going on with the firm's account. The account was then examined, and this check for \$2000 pronounced a forgery. Plaintiff telegraphed to defendant to hold the funds of T. M. Simpson, and the same day sent a messenger to notify defendant of the forgery. Subsequently plaintiff tendered back the forged check and demanded the \$2000. Defendant offered to pay the \$200, still remaining on hand, but claimed that it was not liable for the \$1800 paid over to Simpson before notice of the forgery.

At the trial, Wm. A. Simpson testified that the signature on the forged check was "nothing like" the genuine signature of his firm, that their checks were always drawn from their regular check-book, that they were printed in blue with the internal revenue stamp on the paper, and were always perforated with a stamping machine before delivery, and that he had given special orders to the officers of the plaintiff not to pay any checks of his firm, unless in this regular form. The forged check was not from the regular check-book of Simpson & Son, was printed in red, with an adhesive revenue stamp put on it, and was not perforated by the stamping machine.

Plaintiff denied the receipt of any such orders from Simpson & Son, and gave evidence to show that the drawing of checks not from regular

check-books, and the omission to use the perforating stamp, were so common in practice, that no inference of negligence could be drawn from the failure of the officers to notice such facts in connection with this forged check.

It was also in evidence, that both plaintiff and defendant were members of the clearing house, and that by a rule thereof, checks received in the morning exchanges, "when found not good or informal," must be returned to the bank from which they have been received before 12 o'clock of the same day.

Opinion delivered July 5, 1873, by

MITCHELL, J.—Upon the facts and the evidence as above stated, the plaintiff contended, first, that under the act of 1849, its negligence, if it existed, was no defence to this action; and secondly, that there was no evidence in the case from which the jury should be allowed to infer negligence. The case was, however, left to the jury with the instruction, *inter alia*, that "the defendant was bound to wait a reasonable time to see if the check was good. Having waited a reasonable time without notice that there was anything wrong, it would be entitled to consider the check all right, and to pay out money on its credit.

"The rule of the clearing house does not apply to forged checks, but it may be considered by the jury as some indication of what a reasonable time would be.

"If the jury believe the plaintiff was negligent in taking the check, and defendant waited a reasonable time before paying out the money, they should find a verdict for the sum of \$200, admitted by defendants to be due, but if plaintiff was not negligent or defendant did not wait a reasonable time, then they should find for the whole \$2000, with interest."

The question now before us is, whether there was error in this charge, and the majority of the court are of opinion there was not.

Prior to the act of 1849, a bank was held bound to know the signatures of its depositors. As against a bank accepting or paying a check on itself, it was *presumptio juris et de jure*, that the check was genuine. A severer case for the application of the rule can hardly be imagined than *Levy vs. Bank of U. S.*, 1 Binn. 27, where the bank was held bound by an entry of a forged check as cash in the depositor's book, although the forgery was discovered the same day, and in the meantime the depositor had not lost anything or changed his status in any way, by reason of the entry of the deposit, and although on being told of the forgery, he had said, if that was so, "we are perfectly agreed it is no deposit."

The rule of that case was undoubtedly changed by the act of 1849, but did that act mean to make the right to recover back money paid on a forged instrument absolute in all cases without regard to fraud, negligence or intervening equities?

Taken literally and by themselves, the words of the act will bear that interpretation, but the sound rule of construction requires that the language of a statute shall be read in connection with the established rules of law relating to the same or kindred subjects. It will hardly be argued that actual fraud on the part of the bank would not effectually bar a recovery by it, and it has already been decided under this act that negligence after the discovery of the forgery will be a good defence. In

Rick vs. Kelly, 6 C. 527, Judge Porter says, "the judgment of the court is, that notice of the forgery within a reasonable time after its discovery, and an offer to return the note, are necessary to the maintenance of an action for the recovery of the money, unless the note be shown to possess no value." I am not unmindful of the distinction that may be drawn between negligence in the receipt of the check and negligence after the discovery of the forgery, but the case of *Rick vs. Kelly* is conclusive authority that the act of 1849 is to be construed not separate and isolated, but in connection with other settled rules of law. The forged instrument must be returned before suit brought, unless it has no value at all, or unless a return be waived (*Roth vs. Orissy*, 6 C. 145), because whatever value there is to it the party who is to pay back the money received on it is entitled to get, but on what ground is notice of the forgery within reasonable time required, except that in the meantime he may ignorantly and innocently do some act or lose some right whereby he may be prejudiced?

Whenever the recovery of the money paid on a forged instrument will leave the parties in the same condition as if payment had been refused in the first instance, then undoubtedly the act of 1849 allows a recovery irrespective of the payer's negligence; but construing that act as we think it must be construed, in connection with the well-settled and most equitable principle, that where, by the act of a third person, a loss must fall upon one of two innocent parties, he shall bear the loss by whose act or default it was occasioned, we are of opinion that negligence on the part of the person paying the money, followed by a change of condition of the person receiving it, without negligence, and in reliance on the act of the payer, constitutes a good defence.

We do not regard this decision as at all at variance with *Tradesman's Bank vs. Third Nat. Bank*, 16 Sm. 435, as Justice Read, in that case, expressly reserves the decision of what would have been defendant's situation had it paid over the money before notice.

Nor is this decision at all inconsistent with our own, just pronounced in *Union Nat. Bank vs. Chambers*. In the latter case there was no sufficient evidence that the defendants had altered their condition in consequence of the plaintiff's act, the conversation with the paying-teller, on which the most stress was laid, having taken place after the defendants had taken the draft and given their check to Rizer. The decisions are therefore entirely harmonious, though it may be proper to add, that the views of the court as to the scope of the act of 1849 are not entirely in accord.

Rule discharged.

Thayer and Briggs, JJ., dissent.

Samuel Dickson, Esq., for plaintiff.

C. S. Pancoast, Esq., for defendant.

[Leg. Int., Vol. 30, p. 232.]

**SCHAIBLE vs. WASHINGTON LIFE INSURANCE COMPANY OF
NEW YORK.**

1. In a case where the answers to the interrogatories accompanying an application for a life insurance were representations and not warranties, and in which the question was, whether the answers were made in good faith, or falsely and fraudulently, the jury having found a verdict for the plaintiff upon competent and satisfactory evidence, the court refused a new trial, although it appeared by a *post mortem* examination that the answers were erroneous in point of fact.
2. A photograph, recognized and proved by witnesses to be a correct and truthful representation of the deceased, at or about the time of the insurance, permitted to go to the jury as evidence of the physical appearance and condition of the assured at that time.

Rule for a new trial. Opinion delivered *July 12, 1873*, by

THAYER, J.—This was an action upon a policy of insurance for \$5000, upon the life of *Eureika Randon*.

The defence was alleged fraudulent representations in the application. The assured died suddenly ten days after the application was made, and the weight of the evidence undoubtedly was, that she died of an abscess in the right lung. A *post mortem* examination made at the request of the defendants revealed the fact that the right lung was much diseased. The left lung and the other vital organs presented a normal appearance. Previous to the insurance the deceased was examined by Dr. Griffith, a regular physician, and employed by the company for that purpose, who testified on the trial that he had been an examining physician for the company in at least one hundred cases, and that the deceased appeared at the time of her examination to be in good health. He had given a certificate accordingly to the company.

The insurance agent, who brought the application to the company, testified that he had previously procured a large number of insurances for the company, and that he saw no evidences of disease whatever in *Eureika Randon*, at the time her application was made. Nine witnesses, acquaintances and friends of the deceased, some of whom had seen her within three or four days of the time of her death, testified that she was a healthy-looking woman, presenting no outward indications whatever of disease, and that they thought her in good health at that time. There was hardly a breadth of testimony to contradict or rebut these statements. The husband of the deceased kept an eating-house, and the deceased was engaged almost up to the day of her death in superintending the active duties of the establishment.

Annexed to the answers of the assured to the usual interrogatories appended to the application were these words: "It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned, that the above statements shall form the basis of the contract for insurance, and also that any *wilfully untrue or fraudulent answers, any suppression of facts in regard to the party's health, or neglect to pay the premium, will render the policy null and void.*" It is quite clear that the statements made by the deceased in her answers were, according to the terms of this insurance, not warranties, but representations. Indeed, they are expressly so called in the policy itself, the preliminary words of which

recite that it is made "in consideration of the *representations* made in the application, and of the premium paid." It is obvious, therefore, that the validity of the policy, and the liability of the defendants to make it good, depend entirely upon the good faith of the assured in the representations which she made in regard to her health. If she answered the questions honestly, and did not wilfully and fraudulently suppress any facts in regard to her health, then the defendants are bound to make their insurance good, although *Eureika Randon* may, at the time of the insurance, have had an organic disease. The case was left to the jury upon that basis. The issue tried by the jury was, were the answers made in good faith and without any suppression of facts, or were they false and fraudulent? Was there concealment and suppression of the truth? These issues the jury have found in favor of the plaintiff upon sufficient and credible proof.

We are asked to set aside the verdict upon the theory that *Eureika Randon* must have known that she was diseased, because she died of an abscess in her right lung ten days after her application for insurance. How can we say that of a person, who, according to all the evidence, presented every outward appearance of health almost to the very time of her death?

Can we say that she ought to have been more wise in surgery than the company's examining physician, who, upon a deliberate corporal examination, declared and certified that she was in good health? Would it be reasonable for us to conclude, as matter of law, that *Eureika Randon* was wiser than Dr. Griffith, and that she knew she was diseased, although the defendants' physician could not discover it, and although she had no cough, went about her daily duties without inconvenience, and without complaint, had no occasion for medicine or doctors, and appeared to the eyes of her friends and neighbors a healthy person? Is it a thing unheard of, or in its nature impossible, that internal organic decay may exist for a time without serious interruption of the functions of life? or, are all persons equally quick to detect the presence of disease in their own bodies? Can we certainly say, that the *post mortem* alone proves the bad faith of *Eureika Randon*? Can we say that, in anticipation of her own death, she deliberately and knowingly certified a falsehood, because the surgeon's knife has revealed the fact that there was a sufficient cause for her sudden death? It would be very hazardous for us to do so. Perhaps we might commit a great injustice by doing so. If it be argued that the company's physician must have been careless or mistaken, is it necessary that we should help out that theory by a harsh judgment against the deceased? And that in order to relieve the defendants from the consequences of their own negligence, and against the finding of the jury who have deliberately investigated the facts? It does not appear to us to be our duty to do so.

If the defendants believe that they have suffered from the carelessness or incompetency of their own agents, there will be at least some compensation to those who are interested in the legitimate and successful transaction of their business, if they shall gather from their reflections, the useful lesson, that receiving and dividing premiums does not comprise the whole duty of insurers.

The plaintiff, during the trial, produced a photograph of Eureka Randon, which he proved, by several witnesses well acquainted with her, and who had seen her within a week of her decease, to be a truthful representation of her as she appeared at that time. They testified that it was a faithful likeness, and that she appeared at that time as fleshy and as well in all respects as she was represented in the picture. The photograph was then shown to the jury. The defendants objected to this. But we think that the photograph, thus proved and verified by witnesses who saw the original at a period approximating so nearly the date of the contract of insurance, was competent to go to the jury as evidence of her apparent bodily condition at that time.

If it was competent for witnesses to portray her physical appearance to the jury by words, it is difficult to assign any good reason why the same might not be done by a picture, recognized and proved by her friends to be a truthful and correct representation of her person.

Rule discharged.

R. P. White, Esq., for plaintiff.

Samuel Dickson, Esq., for defendant.

[Leg. Int., Vol. 30, p. 232.]

HALL vs. SLOAN.

Where a commission merchant rendered an account-sales to his consignor, which was not objected to for six months, and the consignor drew upon the merchant for the proceeds of the sales, also without objection: *Held*, that the account-sales thereby became an account stated, and that the consignor could not afterwards maintain an action against the commission merchant for selling contrary to instructions.

Rule for a new trial. Opinion delivered July 12, 1873, by

THAYER, J.—The plaintiff consigned to the defendants, who were shipping merchants, 96 bales of cotton, to be sold on his account, upon which the defendants made large advances. The plaintiff alleged that the defendants agreed to hold the cotton for four months if requested so to do. The defendants denied this allegation, but the verdict of the jury must be regarded as having established it in favor of the plaintiff. While the cotton was in the hands of the defendants, they called upon the plaintiff's agent, through whom the consignment had been made, and asked him if he did not think it best to sell. He replied that he had no authority to act and no advice to give. Some of the cotton was then sold by the defendants. Afterwards the plaintiff's agent requested the defendants to hold the balance for a time. The defendants, however, fearing that the market might decline, sold the remainder of the cotton, and sent to the plaintiff a full account of the sales made. Prices advanced after the sale. The plaintiff retained the account sales without objection to it for more than six months, having, in the interval, drawn upon the defendants for the whole of the remaining proceeds, except a small balance of \$37.53. Under these circumstances we think the plaintiff's action cannot be maintained. An account sales becomes an account stated by the consent of the consignors to whom it is sent, and this assent need not be expressed in words. It may be implied from the conduct of the party. It is the settled law merchant that an account rendered is allowed if not objected to within a reasonable time. It is indispen-

ble to the transactions of commerce, which require that the merchant should be informed by his correspondent without unreasonable delay, whether his acts and accounts are ratified or disapproved, that the integrity of this rule should be rigidly maintained. The silence of the plaintiff for more than six months after the account sales was received, raises a legal presumption of his assent, while his drawing upon the defendants for the proceeds of the sales, without any objection made, raises a still stronger presumption to the same effect. These principles are too well settled to require now the support of authority. But the law upon the subject was very clearly expounded by Sharswood, J., in his charge to the jury in *Bevan vs. Cullen*, tried in this court, and reported in 7 Barr, 282.

Rule absolute.

Richard P. White, Esq., for plaintiff.

Jerome Carty and *George W. Thorn*, Esqs., for defendant.

[Leg. Int., Vol. 30, p. 232.]

HILLARY vs. ROSE.

It was stipulated that a surety for payment of rent should have notice of tenant's default: *Held*, that without such notice, suit could not be maintained against the surety.

Opinion delivered July 12, 1873, by

MITCHELL, J.—This was an action of covenant against a surety for arrears of rent. At the time of signing the covenant of suretyship defendant took from plaintiff a written paper, as follows: "Mr. J. F. Hillary is to notify Mr. W. R. Rose, quarterly, of any non-payment of rent on the part of G. W. Wait." Signed by plaintiff.

A quarter's rent came due July 27, 1872, and on plaintiff's going to the house to demand it, he found the tenant had removed secretly and taken his goods and furniture with him. On October 5, 1872, without having given any previous notice to defendant, plaintiff commenced this action. At the trial, the question was reserved, whether plaintiff could recover without proof of notice of non-payment of rent, as stipulated in the paper signed by him at the time of making the lease.

The chief purpose of this paper would appear to be to inform defendant whenever he was likely to become chargeable with more than a single quarter's rent, but it may also have been intended, or a notice under it may have had the effect, to enable him by some means to secure himself against loss by the liability he was incurring. How it could have had such effect in the present case is not at all clear, but the surety having stipulated for notice, we are not entitled to say that it would have been of no use to him. The bringing of this suit more than two months after the default of the tenant was not sufficient compliance with the plaintiff's agreement to give notice, and we are therefore of opinion on the point reserved, that the jury should have been directed to find for the defendant. Unfortunately, however, the point reserved is not decisive of the whole case, there being also a claim by the plaintiff for injury done by the tenant to the house, over and above ordinary wear and tear. For this the plaintiff still has a claim, and the jury have allowed him damages. This branch of the case was overlooked by the counsel as

well as the court in reserving the point, and unless the parties can agree to a settlement there must be a new trial.

H. T. Fenton, Esq., for plaintiff.

E. C. Shapley, Esq., for defendant.

[Leg. Int., Vol. 30, p. 232.]

COMMONWEALTH et al. vs. KEIL et al.

Where an administrator had embezzled personal assets, and real estate was sold and applied to pay the debts, his sureties on his administration bond are liable to the heirs in an action on the bond.

Rule for a new trial. Opinion delivered *July 12, 1873*, by

BRIGGS, J.—It is alleged by the counsel for the sureties of the administrator, upon the authority of the case of the *Commonwealth vs. Hilgert*, 5 P. F. Smith, 236, that the admission of the record of the Orphans' Court, showing an adjudication in the plaintiffs' favor, was erroneous, because the record showed a confusion of the proceeds arising from the sale of the real and personal estate.

The auditor, however, restated the account, by charging the administrator with the amount of the proceeds of the real and personal property, and credits him with the debts he proved he had paid; and a further credit of the debts proved and allowed to divers creditors who had not then been paid. He then awards the balance to the residuary distributees of the estate, among whom were the plaintiffs. The amount awarded to them is the exact balance after exhausting the entire proceeds of the personalty, and so much of the realty as were required to pay the balance of the decedent's debts.

But it is argued that the record does not show that the money appropriated in payment of the debts was not taken entirely from the proceeds of the real estate.

That is true, nor does it show that it was, or any part of it, until the personalty had been exhausted for that purpose. And the law casts the duty upon the administrator to exhaust the proceeds of the personalty before having recourse to those of the realty, and where debts are shown to be paid (as was the case here), greater than the amount of the personal proceeds, the presumption is, that they were paid in the order, and out of the specific fund first liable for their payment. This presumption continues till overcome by evidence to the contrary. There was no evidence, or offer of evidence, on the part of the defendants, that such was not the case.

Nor can we see how it can benefit the defendants to concede that the administrator took the proceeds of the real estate for the payment of debts, when he had in his hands personal proceeds for that purpose. Such would be a violation of his duty to the plaintiffs, for he held that money, as was said by the court in *McCoy vs. Scott*, 2 R. 222, "not absolutely, but *sub modo*," for the payment of debts. He held so much of this money not required to pay debts expressly for the plaintiffs. And it surely was no answer to the plaintiffs to allege, "true, the administrator had personal assets in his hands with which to pay the debts; but he has embezzled them, and has taken the money which otherwise would come to you to replace them."

The reply to such an allegation is, "that is none the less a wrong to the plaintiffs, and is just such a breach of duty on the part of the administrator as renders him and his sureties liable to them." The error which the sureties have fallen into is in supposing that because the real estate may be taken to pay debts even when the administrator had sufficient personal assets to pay them, but which he had embezzled, that, therefore, the sureties are relieved upon showing their actual payment out of the real assets. Not at all, for the equity of the decedent's creditors is superior to that of his heirs, and they must be paid, though the heirs get nothing.

But, as against the administrator, who wrongfully takes the money to pay them, which would otherwise come to the heirs, such default is just as glowing and inexcusable, as if he had appropriated it to his own use when there were no debts. In such case, it would be relieving himself of the first wrongful appropriation by perpetrating the second. It would, nevertheless, be a wrong for which both he and his sureties would be liable to the injured parties.

In the case of *Commonwealth vs. Hilgert*, there was an item in the rejected account, for "rents and profits of real estate." And *non constat* that the balance reported by the auditor in that case was not made up in whole or in part of those profits. If so, clearly the sureties were in no way liable for them. But, without elaborating, we think this verdict is so manifestly just, that we are loath to disturb it, unless required to do so by some decisions in all respects analogous, or some rule of policy. And not knowing of such requirement, the rule for a new trial is discharged.

H. F. Hepburn, Esq., for plaintiff.

[Leg. Int., Vol. 30, p. 232.]

STEWART *vs.* AUSTIN.

The meaning of the word "CAVEAT" in the act of April 22, 1856, defined.

Rule for a new trial. Opinion delivered July 12, 1873, by

BRIGGS, J.—There will have to be a new trial in this case. It was thought at the trial, that the act of April 22, 1856, gave conclusive effect to the will of Susan Beam, bearing date December 9, 1863, and admitted to probate the 15th of the same month, because it had not been contested by *caveat* within five years, as provided by the act, notwithstanding the defendant had, within five years, recovered the premises in an action of ejectment, of the defendant's grantor, who claimed the same under another will of the said Susan Beam, bearing date April 2, 1863, though not admitted to probate.

The usual office of a *caveat* is to stop the proof of the will. But the word "*caveat*," as used in this act, cannot mean that, for the act does not require the *caveat* to be filed till after the probate of the will. The words are: "That the probate by the register of the proper county, of any will devising real estate, shall be conclusive as to such realty, unless, within five years from the date of such probate, those interested to controvert it shall, by *caveat* and action at law duly pursued, contest the validity of such will as to such realty," etc.

What then does it mean? It seems to us the proper construction is this, that when a person means to claim the devised land through the devisior, and in order to do so must contest the will, he will have to do so within five years from the time of its probate, or be forever thereafter debarred. If the devisee is not in possession, then by an issue *deviseum vel non*, and proceedings thereon duly prosecuted within five years. If, however, the devisee is in possession, the act does not prohibit the adverse party from contesting the devisee's title by an action in ejectment. Indeed, the act takes away none of the remedies existing at the time of its passage. It merely limits a period within which those remedies should be invoked. The defendant having recovered the land within the five years, notwithstanding the will, he is clearly not within the prohibition of the statute, and being in possession at the time the plaintiff acquired title, such possession was at least constructive notice to the plaintiff of the defendant's title, which affected him alike with his grantor.

Nor can the position assumed by the plaintiff, that it is now too late for the defendant to question the will, avail him. The defendant is not doing so. He stands and defends upon his title as established by his verdict and judgment. That verdict and judgment gave him the possession of the land, and will protect him till they shall be impeached by the plaintiff. The defendant having succeeded, notwithstanding the will, the burden is now cast upon the plaintiff to sustain it, and until he do so, the defendant will be protected by the triumph he has gained.

Rule absolute.

J. Cooke Longstreth, Esq., for plaintiff.

A. Thompson, Esq., for defendant.

[Leg. Int., Vol. 30, p. 240.]

ALLEN vs. FITZPATRICK.

One apportioned mechanic's claim can be filed against two blocks of houses fronting on different streets, where the rear ends extend to and are bounded by a three feet wide alley common to both.

Rule for a new trial. Opinion delivered July 19, 1873, by

MITCHELL, J.—*Scire facias* on an apportioned claim against ten houses on the south side of Christian street and ten on the north side of Montrose street, west of Twenty-third, the rear ends of the two blocks of houses extending to and bounded by a three feet wide alley, common to both.

C. M. S. Leslie conveyed to Wm. Long by deed a large lot on the south side of Christian street, running from Twenty-third to Twenty-fourth streets, and extending in depth southward sixty feet, "to a three feet ten inches wide alley, which leads westward from Twenty-third to Twenty-fourth street. Bounded southward by the said alley," etc. "Together with the free and common use, right, liberty and privilege of said alley, as and for a passage-way, and for the purpose of laying pipes therein, but not for the purpose of conveying water over and along the surface thereof."

On the same day Leslie conveyed to Long a number of lots on the north side of Montrose street, between Twenty-third and Twenty-fourth, extending northward to the same alley, and described as bounded by and with the same right and use of said alley.

These lots were conveyed by Long to the defendant Fitzpatrick, by the same description, and subject to the same restrictions as to the alley. Defendant then engaged plaintiff to do work as a gravel roofer on all the twenty houses, and the question we have now to consider is, whether these two blocks of houses are proper subjects of an apportioned lien.

The act of 30th of March, 1831, sec. 4 (Purd. 1033), provides, that "whereas, it sometimes happens that several houses and other buildings adjoining each other are erected by the same owner, so that it is impossible for the person who has found and provided materials for the same to specify in his claim the particular house," etc., "therefore, it shall be lawful in every such case" to file an apportioned claim.

The letter and intent of this act would seem to be perfectly plain, and would show the claim in this case to be bad, were it not for the decision of the Supreme Court in *Taylor vs. Montgomery*, 8 H. 443. In that case an apportioned lien against houses situated on different streets was sustained, and Lowrie, J., said, "the mechanics' lien laws recognize the filing of one lien against several houses, and the apportionment of the amount among them; but they do not define the cases in which such joint lien is proper. In order to obtain such a definition we must resort to the analogy of other cases, and the case of joint contracts requiring joint remedies is an obvious one." The act of 1831 does appear to define with considerable explicitness the cases in which a joint lien is proper, namely, those in which it is impossible for the material man to specify the particular house into which his materials go, and were it not that the act of 1831 was cited in the argument of that case, it would be difficult to resist the impression that it was not present to the learned judge's mind when he wrote the foregoing sentence, and that he was speaking only of the supplementary thirteenth section of the act of 1836. If, however, the act of 1831 did not define the proper cases for an apportioned claim, and we are to gather a definition from the principles of *Taylor vs. Montgomery*, then, so far as any principle can be gathered from a case in all respects so unsatisfactory, we are unable to say that this claim is not within that decision. It is true, that in that case the yards of the two blocks did actually adjoin, but here they legally adjoin. A conveyance of a lot bounded by an alley is a conveyance to the middle of the alley, and that was the case here with both of defendant's blocks. The fact of an easement of alley way for adjoining owners existing over one and a-half feet of the rear end of each lot does not separate them in any such sense as to allow us to declare a joint lien bad. Though this may be a small step in advance of the decision in *Taylor vs. Montgomery*, it seems to be a step which the reasoning of the court in that case requires us to take. In deference to that authority, therefore, we must hold this a good apportioned lien.

Rule discharged, and judgment for plaintiff on the verdict.

James W. Paul, Esq., for plaintiff.

E. Cooper Shapley, Esq., for defendant.

[Leg. Int., Vol. 30, p. 248.]

THE RICHMOND GRANITE COMPANY vs. DICKINSON *et al.*

The powers of commissioner of highways to make a contract with pavers, considered.

Motion for special injunction. Opinion delivered *July 26, 1873*, by BRIGGS, J.—The complainants do not aver or show, that Cunningham & McNichols have not been selected by the majority of the owners of the real estate, fronting upon the street directed to be paved, but put their equity upon the ground that they were *first* selected by a majority of the owners to pave the street.

The bill presents the case of some of the same owners entering into a contract with both the complainants and Cunningham & McNichols, and thus enabling each party to present to the chief commissioner of highways, as the basis of their claim for his award, to pave the street, a nomination of a majority of owners.

The resolution of councils authorizes the chief commissioner to enter into a contract with a competent paver or pavers, who shall be selected by a majority of owners, fronting on the street, to pave it.

There is no question as to the competency of either of the parties as pavers.

The premises show a case for the discretion of the chief commissioner in awarding the contract to pave, to one or the other of the contending parties for it. *Dickinson vs. Peters*, Legal Intel. 1872, p. 84.

If he give the contract to either of them, he will be within the letter of the direction contained in the resolution of councils. If we were to restrain the commissioner from awarding the paving to Cunningham & McNichols, it would be upon the ground, that they were not the *first* selected parties by the owners.

The word "first" is not in the resolution, and we cannot interject it, and unless we had such power, the commissioner should not be restrained from doing that which, in the exercise of his discretion, the law does not prohibit.

Nor can we, for the same reason, restrain Cunningham & McNichols from entering into a contract with the chief commissioner to pave the street. Their equity is co-extensive with that of the complainants, and there is no law prohibiting them from paving the street, provided they come fortified with authority from a majority of owners, and the award of the chief commissioner.

The grievance to the complainants does not spring out of the conduct of the defendants; but from such of the owners who, first contracting with the complainants, afterwards transferred their authority to Cunningham & McNichols. From such owners the complainants may obtain redress, upon showing a cause of action against them. But they are not parties here, and their relation to the complainants need not be further noticed than to show that a possible right of action against them does not carry with it such right against Cunningham & McNichols, who are in no contract relation with the complainants, and hence, not liable to them in any way.

Nor will the objection avail, that, in their advertisement, Cunningham & McNichols have omitted to mention the space to be paved in

linear feet, the residences of the persons signing and the number of feet owned, or represented by each person so signing, fronting on the street.

The ordinance of March 24, 1871, repeals that of December 31, 1862, except as to the residence of the signers. This objection in any event can only be taken by a party in interest. The complainants not being interested either as an owner, who will be called upon to pay for the paving, or in the contract, should it be awarded to Cunningham & McNichols, can have no concern where they have no interest, and having no interest they are without *status* here upon which to rest an objection.

Motion dismissed.

M. Sulzberger, Esq., for plaintiff.

D. W. Sellers, Esq., for defendants.

[Leg. Int., Vol. 30, p. 248.]

RICHARD WISTAR vs. JOHN E. ADDICKS.

The board of health have power to fence a lot, to remove the cause of a nuisance. An injunction will not be granted to restrain the action of the board, the owner having an adequate remedy at law.

Motion to continue special injunction. Opinion delivered July 28, 1873, by

BRIGGS, J.—The complainant moves to restrain the defendant as health officer, from fencing the complainant's lot in the Twentieth ward of this city, more particularly described in the bill.

The bill shows that the board has adjudicated the lot a nuisance, and that it be cleansed and fenced, but denies the authority of the board to adjudge that it shall be fenced.

The legislation prior to 1840 dealt with the nuisance *per se*. The act of April 5, 1849, was a step in advance and conferred authority upon the board of health "to remove the *cause* of all nuisances that now exist, or may hereafter be created." Hence, the board now have the power to abate nuisances and their cause.

Is fencing necessary to abate a nuisance in any case? If an unfenced lot is of such easy access to those residing around it, and others, the owner cannot prevent them from casting upon it prohibited deposits, because there is no obstruction to their easy access to it, may not the absence of the fence be regarded as the inviting and contributory cause of the nuisance there existing? If the absence of the fence is the cause of the nuisance, and the erection of the fence will remove the cause, then I think the adjudication of the board, even as to fencing, is within the power conferred by the act of 1849, even without the aid of the ordinance, of our city, of 1872 (page 330), expressly conferring authority upon the board, to order vacant lots, in the Twentieth ward, to be fenced in, when, in their judgment, it is necessary as a sanitary precaution to do so.

But is not the board the sole judge as to nuisances and their cause? and have our courts any control over their proceedings, except to see that they proceed regularly in reaching a conclusion? *Kennedy vs. The Board of Health*, 2 B. 366. The act of April 7, 1830, establishing a remedy by lien, for the recovery of the expenses of removing a nuisance by the board, provides that, "the fact of nuisance shall not be inquired into, and the defendant or defendants shall only be permitted to give

evidence of payment, or that unnecessary expenses were incurred by the board in the removal of the nuisance."

This is certainly extraordinary power to confer upon any organization; and the execution of its decrees is as speedy as its powers are comprehensive.

But the cause for the exercise of such authority is also very potential. The board of health of this city now have to deal with three-fourths of a million of people, and if their movements are to be frustrated by injunction, to restrain their proceedings, at the instance of dissatisfied parties proceeded against, the entire usefulness of the board as a sanitary organization would be destroyed, as in a population so great as ours, there would be found those who would keep the board constantly engaged in our courts in responding to their alleged grievances, in consequence of supposed want of authority in their proceedings. And except for this power, a notice to abate a nuisance, instead, as now, of its being the initial step for the speedy abatement of the nuisance, it would be but too often the initial step in a hotly contested and protracted law-suit, and thereby the efficiency of the board become impaired, if not destroyed, and the city, in a measure, be left to the mercy and ravages of disease and pestilence. Against such result the Legislature has wisely provided, and such legislation should be sustained by our courts, except in cases of clear infraction of the law. Such I do not conceive this case to be.

But in any event has not this complainant an adequate remedy at law? If, as he contends, the board has no power to adjudicate the lot to be fenced, their proceedings are *coram non judice*, and will not affect the complainant. If the board shall attempt to recover for fencing the lot, the complainant, by showing in the trial at law, that they had no legal warrant for their proceeding, will certainly defeat a recovery.

Such defence would be full and adequate, and, if valid, is fatal to the prayer for the injunction in the premises. It being an elementary principle of our equity jurisprudence that, where there is adequate remedy at law, jurisdiction in equity will not vest.

The motion to continue the injunction is dismissed, and the injunction granted *sec. reg.* is dissolved.

C. H. Gross and *Thos. J. Barger*, Esqs., for plaintiff.

R. N. Willson, Esq., for defendant.

[Leg. Int., Vol. 30, p. 304.]

SNYDER vs. ARMSTRONG.

HAMSON & COMPANY vs. ARMSTRONG.

Defendants gave A a note signed in blank. A left their service, and four years after transferred the note to plaintiffs, by whom these facts were known. Verdict for plaintiffs set aside.

Opinion delivered *September 15, 1873*, by

HARE, P. J.—This is an action on a promissory note made by **James Armstrong**, and indorsed by **John Armstrong**, the defendant. The question, whether the plaintiffs took the note in good faith, was left to

the jury, who found a verdict in their favor, and the defendant now asks for a new trial.

The history of the case is as follows:

Lewis Eckel was the confidential clerk of James Armstrong. He left his employer's service in the month of April, 1870, having then in his possession two notes, one for \$1800, made by James Armstrong; the other, in blank, signed by James, as maker, and indorsed by the defendant. The former instrument seems to have been a security for a debt which was paid soon afterwards. The latter had been intrusted to Eckel to be used if any unforeseen contingency should arise requiring the aid of John Armstrong's credit. Eckel retained both instruments without the knowledge or consent of his employer, and having gone into business on his own account, bought goods from the plaintiffs in the month of June, and gave James Armstrong's note in payment. The latter failed soon afterward and the note was protested. In March, 1871, Eckel applied to the plaintiffs for a further credit, which they refused to give, unless the existing account was covered. He then stated in substance that he held John Armstrong's indorsement in blank as a collateral for the note in their possession, and that he would fill it up and transfer it to them if they would let him have the goods which he wanted. They accepted this proposition, and he then dated the note as of October 1st, and made it payable to them at seven months for \$1000, with interest added.

It is well settled that the delivery of a note indorsed in blank authorizes the payee to fill it up and put it in circulation, and the maker cannot allege as against a bona fide holder, that the agent exceeded his instructions, or was guilty of a fraud. The power must, however, be exercised within a reasonable time. If the interval is so great as to indicate that the power has been abused, who is cognizant of the delay will be put on inquiry. In the present case the plaintiffs knew that Eckel had left James Armstrong's service for more than a year, and that the note was in his hands unused during the whole of that period. These were suspicious circumstances, which should have induced the investigation that would have led to a discovery of the truth. We are inclined to think that the plaintiffs had constructive notice, and are very clear that the verdict is against the weight of evidence. The rule for a new trial is made absolute.

Arthur M. Burton, Esq., for plaintiff.

R. C. McMurtrie, Esq., for defendant.

[Leg. Int., Vol. 30, p. 304.]

THE INSURANCE COMPANY *vs.* BAUER.

The 4th and 8th equity rule as to exceptions to a bill for surplusage and impertinence are to be construed together.

Opinion delivered *September 15, 1873*, by

HARE, P. J.—This case is before us on exceptions to the bill for surplusage and impertinence. The complainant contends that the exception comes too late, and relies for this position on the 8th rule in equity, which is as follows:

"No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent, nor unless the exception shall be filed within ten days after service of the same upon the party excepting or his counsel." . . .

If this regulation stood alone it would be conclusive, but there are others bearing on the same point, and the whole must be read together. By the terms of the second rule the suit is to be instituted by serving a copy of the bill on the defendant, who must appear within fourteen days thereafter. It is difficult to believe that the intention was to require him to except before appearing, at a time when he might not have the advice of counsel. Accordingly, the fourth rule prescribes that—

"Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recital of deeds, documents, contracts, or other instruments of writing, *in haec verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may on exceptions be referred to a master by any judge of the court, for impertinence or scandal, or the court, or any law judge thereof, may decide thereon without a reference, unless the case shall require it." . . .

This provision is couched in the broadest terms without restriction as to time. It would therefore seem reasonable to hold that a defendant has ten days after appearing in which to file exceptions to the bill.

If we now turn to the main question, there can be little doubt that the bill sins against the provisions of the fourth rule, as above cited, by setting forth various documents in full, which should have been referred to briefly, and so much only of their contents pleaded as is material to the determination of the issue. The exceptions are therefore sustained, except the last. This refers to the 14th, 15th, and 16th sections of the bill, which aver that the defendants rely on various pretended grounds as disproving the plaintiff's equity, and then go on to allege that these pretences are fallacious and contrary to the facts of the case. Such an anticipation of the defence has been an established part of equity pleading since special replications fell into disuse, and the answer could not be confessed and avoided. It is, moreover, recognized by the rules which govern our practice. The remaining exception is therefore dismissed.

Thomas J. Clayton and C. F. Erichson, Esqs., for plaintiff.

George Biddle, Esq., for defendant.

[Leg. Int., Vol. 30, p. 304.]

BOND vs. THE INSURANCE COMPANY.

1. A insured the life of her husband and subsequently joined him in executing an assignment to B in trust for her husband's children; after his death, A challenged the right of the trustee to the fund: *Held*, that the trustee was entitled to it.
2. A voluntary assignment which does not pass the legal title held in this case sufficient as an equitable transfer.

Opinion delivered *September 15, 1873*, by

HARE, P. J.—This case originated in the following circumstances: In the year 1870 Mrs. Martha Bond insured the life of her husband, John R. Bond, for the sum of \$10,000, in the Mutual Benefit Life Insurance Company of New Jersey. She subsequently joined him in executing an instrument under seal, by which the amount insured above the sum of \$5000 was assigned and set over to one Henry Bunting, in trust for her husband's children, who are alleged to be the offspring of a former marriage. This was not the conduct of a step-mother; but when her husband's influence was removed by death, she challenged the right of the trustee to the fund. The money was paid into court, and an issue framed and submitted to a jury, who found that the only consideration for the transfer was the affection which John R. Bond bore to his children. It is proper to add, that the trustees had notice of the assignment—a circumstance which might be material in England, but seems to be of no moment in Pennsylvania. We have now to determine the validity of the assignment with the aid of the light derived from this verdict.

It is obvious from what has been said, that the case involves two inquiries. Is a voluntary assignment of a chose in action, which does not pass the legal title, effectual as an equitable transfer? Can a married woman dispose of her personal property, without a separate acknowledgment?

Those who are conversant with such studies know that the former question has been the subject of a protracted controversy which is not yet terminated. It was long held, that where an assignment without a valuable consideration was legally inoperative, it could not be upheld in equity. *Kennedy vs. Ware*, 1 Barr. The presence of a seal made no difference in the application of the principle. *Ellison vs. Ellison*, 6 Vesey, 658; *Ward vs. Audland*, 8 Beavan, 20. If the instrument was so worded as to confer a right of action in debt or covenant, the plaintiff would not be restrained by an injunction. If it was not, the want of a legal remedy did not afford a ground for equitable relief. In either case the chancellor suffered the law to take its course.

The rule as stated by Lord Eldon, in *Ellison vs. Ellison*, is, "that, if you want the assistance of the court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*, as, upon a covenant, to transfer stock, etc., if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant. But if the party has completely transferred stock, etc., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court." A grant which fails of effect at law is a covenant in the sense of this distinction. In *Ward vs. Audland*, Lord Langdale

said: If the property was *legally* vested in the plaintiff, he might have recovered it at law, and applied it on the trusts; if the property was not *legally and effectually* vested in the plaintiff, then, as the deed was voluntary, this court could afford no assistance to the plaintiff in recovering it; and, under these circumstances, the only question between the parties is, what is the *legal* effect of the assignment? The debt and policy of assurance are choses in action *not assignable at law*, and it is plain, that the whole estate and interest of the assignor did not and could not pass to an assignee; and I apprehend that, in the case of a voluntary deed, neither the assignor nor his executor could have been compelled to permit the assignee to use his name for the recovery of the debt." So in *Meek vs. Kettlewell*, 1 Hare, 474, the vice-chancellor was clearly of opinion, that an assignment under seal of that which did not pass at law by the operation of the assignment itself, unaccompanied by other acts, was no better than a covenant or agreement to assign. It was by treating a deed which failed of effect as a covenant, that chancery was enabled to give relief through a decree for specific performance. *Chew vs. Barnet*, 11 S. & R. 389; *Baylis vs. The Commonwealth*, 4 Wright, 37. Hence it followed, that where the grantor received no consideration, and the obligation was merely gratuitous, the grantee was left to find such remedy as he could at law.

This course of decision seems to have been well founded in the peculiar doctrines of equity and the relation which they bore to the common law. It can hardly be vindicated on the broad principles of jurisprudence. It is a general rule, that he who owns shall have the power to dispose. The *jus disponendi* should not be withheld except for some sufficient cause, and on special grounds. What if anything the grantor receives as an equivalent, concerns him, and not society at large. The right to give is consequently as clearly incident to the right of property as the right to sell. Choses in action are as much within the scope of this principle as lands or chattels; and yet as they cannot be legally assigned, the refusal of equity to aid voluntary transfers rendered it impossible to give a chose in action. The effect was to impose an arbitrary restraint on alienation, which was not unfrequently attended with injurious consequences. A large amount of property is locked up at the present day in bonds, stocks, and other evidences of debt. A capitalist might count his wealth in these by thousands, and yet find it difficult to provide for a friend or relative. It was easy to give a house or chattel, but if he attempted to bestow a debt, there was an unexpected obstacle. A demand might be sold, or pledged, or released, but it could not be the subject of a voluntary transfer. If the donor was versed in the law, he might obviate the difficulty by collecting the money, and investing it in the name of the beneficiary. But this required time and more knowledge than is ordinarily possessed. It was, moreover, impracticable where, as in the case of a policy of insurance, the debt was payable at a future day and contingent.

The evil was so obvious, that there was a constant effort to escape from it. A chose in action could not be assigned without a valuable consideration, but where a trust exists, it may be enforced though in favor of a volunteer. Hence an inference, that where a man declared that he held assets which belonged to him in trust for a volunteer, it was

a valid gift. If, said Lord Cranworth, "I say expressly or impliedly that I constitute myself a trustee of personalty, that is a trust executed and capable of being enforced without consideration;" and the doctrine was applied in numerous instances to choses in action.

It is not easy to find any sufficient ground for this distinction.

It was established at an early period, that the transfer of the legal title in trust for a third person would vest the beneficial interest in the latter. Such was the origin of uses, and subsequently of trusts. A declaration of trust under these circumstances substantiates the existence of a duty which would be obligatory, independently of the declaration. But it does not follow that an admission can give rise to a fiduciary obligation where none exists. "The ordinary power of a chancellor," said Gibson, C. J., in *Read vs. Robinson*, 6 W. & S. 329, "extends no further than the execution of a trust sufficiently framed to put the title out of the grantor, or to the execution of an agreement for a trust founded on a valuable consideration," and the language of the same judge in *Morrison vs. Biereer*, 2 W. & S. 86, shows that he regarded a declaration of trust as inoperative where it does not rest on an antecedent obligation.

In this uncertainty we may revert to principles. A declaration of trust by the owner of property in favor of a volunteer has no peculiar efficacy. It is simply a gift which derives its force from the will of the donor. As applied to land, it is consequently invalid, if not under seal; and perhaps even then, unless the estate lies in grant. Where the law prescribes the mode of conveyance, it must be followed. When, however, there are no legal means of transfer, any words expressing an intention to confer a present interest may be effectual in equity. There can be no clearer manifestation of a design to part with the right of property in favor of another than an absolute assignment to him or for his use. The notion that a gift, which would be valid if made through a declaration of trust, will fail if put in the form of an assignment, was accordingly repudiated in *Richardson vs. Richardson*, 3 L. R. Eq. 686.

The question was, whether the beneficial interest in certain promissory notes passed by a voluntary assignment of all the donor's personal estate. She did not indorse the notes, and the legal title consequently remained in her. The chancellor said that it was impossible to contend, after the decision in *Kekewich vs. Manning*, 1 De Gex; Mac. & G. 176, that the beneficial interest did not pass by the assignment, because "the decision in that case was not merely that a person who, being entitled to a reversionary interest or to stock standing in another's name, assigns it by a voluntary deed thereby passes, notwithstanding that he does not in formal terms declare himself to be a trustee of the property, but it amounts to this, that an instrument executed as a present and complete assignment is equivalent to a declaration of trust."

Here, as in *Kekewich vs. Manning*, the instrument was under seal, but the *ratio decidendi* was broad enough to include an assignment by parol. Accordingly where the donor signed and delivered the following memorandum to his physician: "I hereby give and make over to Dr. Morris an India bond, number d. 506, value £1000, as some token for his kind attention to me during illness;" Lord Romilly said, "the writing is equivalent to a declaration of trust. If the donor had said, 'I under-

take to hold the bond for you,' that would have been a declaration of trust, though there had been no delivery. This amounts to the same thing, and Dr. Morris is entitled to the bond." *Morgan vs. Millison*, 10 L. R. Eq. 475.

The decisions have advanced step by step to this conclusion, which is now established in England. The case of *Kennedy vs. Ware* may be thought to indicate that it does not prevail in Pennsylvania. I have endeavored to show that the English authorities, on which Chief Justice Gibson relied, have been overruled. If this were a court of error, our course would be clear. As a tribunal of the first instance, we ought to adhere implicitly to the rulings of the court above. If the case of *Kennedy vs. Ware* were identical with this it would control our judgment. The assignment there was by parol. Here it is under seal. The difference seems to be immaterial according to the authorities, but it affords room for a doubt. There is another consideration. The fund is given in trust for Jane and James S. Bond. They are described in the instrument as the children of John R. Bond. If they are also Mrs. Bond's, there is a meritorious consideration arising from a tie of blood. It seems that equity will give effect to a provision for a wife or child, though not for a collateral relation. See *Hayes vs. Kershaw*, 1 Sanford Ch. 258; *Buford vs. McKee*, 1 Dana, 107; *Dennison vs. Goehring*, 7 Barr. 175; *Kennedy vs. Ware*, 1 Id. It was alleged during the argument that these were Bond's children by a former wife, but this does not appear of record. On the whole, we deem ourselves entitled to uphold the assignment.

The other branch of the case is hardly less obscure. At common law a married woman had no power to dispose of her personal estate. The right of alienation belonged to her husband, and could only be exercised by her as his agent. The act of 1848 provides, that the property of a *feme covert* shall not be sold, mortgaged or transferred, or in any manner encumbered by her husband, without her written consent first had and obtained before one of the judges of the Court of Common Pleas of this Commonwealth. Whoever drafted this act seems to have forgotten that disabling the husband does not enable the wife. The act forbids him to transfer without her written consent, etc., but it provides no means by which she can alienate. The result was a painful uncertainty, which the lapse of twenty-five years and an exhaustive judicial investigation have not removed. In *Moore vs. Cornell*, 18 P. F. Smith, 320, Sharswood, J., said, that the great object of the statute was to secure the property of a married woman against her husband and his creditors. It did not confer upon her any power or capacity which she did not possess before, except that of making a will and of binding her estate by a contract for necessities. It had accordingly been held in *Sloops vs. Blackford*, that an assignment of a mortgage by a married woman is invalid, unless her husband joins in the instrument, and it is authenticated by her separate acknowledgment. It was said in the course of the same opinion, that a mortgage, though in form a conveyance of land, is substantially a security for a debt. It is personal property—a chose in action—and whatever gives the money secured by the mortgage will carry the security along with it.

It might be inferred from this language that the transfer of a wife's personal property requires not only the concurrence of her husband, but

an acknowledgment in accordance with the act of 1858, as modified by that of April 9, 1849.

Such a rule would render it impracticable for a married woman to dispose of her stocks and furniture, or even to make the smallest present, without calling in a justice of the peace or notary public. Nay, more, the restriction would extend to purchases, because it is impossible to buy without giving an equivalent. It has not been imposed in terms, and we may believe that the court above will do some gentle violence to the act of 1848, rather than adopt a conclusion fraught with injurious consequences. The judge who delivered the opinion in *Moore vs. Cornell* has shown in other instances, with his wonted clearness, that if a mortgagee is a creditor, he is something more: he is an owner, who may enter and take rents and profits, until the debt is satisfied. Hence a transfer of his interest may be acknowledged and recorded; a mode of authentication which would be inappropriate in the case of a chose in action. The result is, that according to the best consideration that we have been able to give to the subject, the trustee is entitled to the fund transferred by the assignment.

Thos. J. Diehl, Esq., for trustee.

Messrs. Barger & Gross, for plaintiff.

H. G. Clay, Esq., for defendant.

[Leg. Int., Vol. 30, p. 305.]

GERETY vs. READING RAILROAD COMPANY.

Proceedings will be stayed until payment of the costs of a former action for the same cause between the same parties, although the former action was ended by a compulsory nonsuit.

Rule to stay proceedings. Opinion delivered September 15, 1873, by THAYER, J.—The plaintiff having brought an action in this court, and failing upon the trial to make out his case, was nonsuited by the court. He then commenced another action against the same defendants for the same cause, without having paid the costs of the former action. Thereupon the defendants took the present rule. The practice of courts in staying proceedings in a second action for the same cause between the same parties, where the plaintiff has failed in his first suit, until he shall have paid the costs of that suit, is a very beneficial one, and too well settled to admit of any doubt. It is founded upon the necessary control which courts of justice have over their own proceedings, and their duty to prevent them from being made the means of oppression and vexation. 3 Wilson, 149; 2 Wm. Bl. 741; 1 Tidd's Pr. 94; 2 T. R. 501, n.; Beames on Costs, 209. It is a practice which, as has been well said, is convenient and just in all the aspects in which it can be viewed. Whatever may have been its origin, it is not confined to actions of ejectment, but applies equally to *all forms* of action. Nor is it confined to cases in which there has been a trial on the merits. It is applicable also to cases of nonsuits: *Nevitt vs. Lade*, 3 Doug. 396; and to cases of discontinuance, *non pros.*, and judgment on demurrer. Neither will a slight variation in the names of the parties make any difference: *Lamply vs. Sands*, 1 Tidd's Pr. 539; or the fact that the first action was in another court. All these points have, in other places, been settled in various decisions. In Penn-

sylvania, by a happy coincidence, they have all been determined in one, for in *Flemming vs. The Pennsylvania Insurance Company*, 4 Barr, 475, an order for a stay of proceedings until the costs of a former action should be paid was made in a case where the action was upon a policy of insurance, where the former action was in a different court, and was ended by a compulsory nonsuit after the plaintiff had gone through his evidence, and where there was a slight variation in the parties to the two actions. The justice and propriety of such orders can, therefore, no longer be open to question in this State. There may be, sometimes, cases of hardship, in which this restraint would not be put upon a plaintiff. It rests in the discretion of the court, and a refusal to exercise this power is not assignable for error. *Withers vs. Haines*, 2 Barr, 435. In the present case we see nothing to exempt the plaintiff from the operation of the usual practice.

Rule absolute.

Alexander D. Campbell, Esq., for defendants.

David W. Sellers, Esq., for plaintiff.

[Leg. Int., Vol. 30, p. 320.]

WELSH vs. OATES.

A parol lease of her property for a year by a married woman is binding upon her, where she has received a valuable consideration for it in advance, and accepted the rent as it fell due.

Ejectment. Opinion delivered September 27, 1873, by

LYND, J.—The plaintiffs are husband and wife. The latter, in January, 1872, received from the defendant \$750, for the good-will of the premises in question, and agreed (by parol) that he might go into possession for the term of one year at \$33 a month. Her husband was fully apprised of the transaction and did not object.

Before the year had expired, and without the defendant having been in any default, they began this suit.

These facts appearing from the testimony adduced for the plaintiff, a nonsuit was entered.

Plaintiffs complain of this nonsuit, on the ground that a married woman cannot make a valid lease of her real estate, unless by writing, acknowledged according to the act of February 24, 1770 (*Brightley's Digest*, 460).

The act of 1770 undoubtedly prohibits a married woman from "disposing of and conveying" her real estate, by any form of assurance whatever, including that of lease, without an acknowledgment thereof, as in the said act provided; but we are of opinion that a lease for one year (whether by deed or parol) is not a "disposal" of her real estate, within the provisions of the said act.

When this act was passed, a married woman never joined in a lease of her real estate for one year. Practically a lease by her husband for such a term was sufficient—it might have been good for a very long term, should they both, or should he, having had issue and surviving her, so long have lived.

It would be simply absurd then to maintain that the Legislature, when they provided "where any husband and wife shall hereafter incline to

'dispose of and convey' the estate of the wife," etc., had in view a lease for one year.

It is conceded that the object of the act was to protect the estates of married women from undue influence or coercion on the part of their husbands, leading to an improvident disposal of her real estate. It was to discourage such a conveyance of or charge upon her real estate, as would operate beyond the period of the husband's life, to the injury of herself or of her heirs. Is a lease for a year within its purview?

No existing construction of the act is inconsistent with this view. All the cases are of attempts by a married woman to sell, charge or lease, for a longer term than one year, her real estate, *i. e.*, to make such disposal of her estate, as *might* have been within the contemplation of the legislators of 1770. It is not necessary even to cite them.

But the construction just stated is not only the proper but, since the act of April 11, 1848, the necessary construction of the act of 1770. Since then the husband cannot *mero motu* make a lease of his wife's real estate. It is now her act—although his concurrence is still necessary. Shall she be put to the trouble and expense of preparing and signing a written lease, and of a separate acknowledgment before a justice of the peace, in order to let her property for a single year? If the law be as contended for by plaintiffs, no well-advised lessee would rent property from her without such a lease. It is true that the act of 1848 does not extend her power of "disposal," but it certainly assures to her the "use and enjoyment" of her real estate. This certainly includes the power to let another occupy it. This power practically would be valueless, if the term should be limited to less than one year. Hence, practically, there can be no "enjoyment" of real estate, if the power to lease be limited to less than one year.

Is it not something like a corollary to this, that a letting for one year of one's real estate is merely an "enjoyment," and not a "disposal," of it?

Is it not a hardship then, that a married woman's "enjoyment" of her property should be fettered by a rigid construction of an act of assembly, that had in view her "disposal" of it?

By the distinction just suggested, we harmonize this legislation. This is certainly better than to subordinate the one act to the other; and especially a later act to a prior one.

This construction is also in harmony with that put upon the act in *Lippincott vs. Hopkins*, 7 P. F. S. 328 (recognized in *Swayne vs. Lyon*, 17 P. F. S. 436, and *Finley's Appeal*, *Ib.* 453). There it is held that a married woman is liable upon a contract for *necessary* repairs to her separate estate. As it cannot be contended that the act of 1848 expressly empowers her to make such a contract, the above ruling must be upon the ground that the power is constructively given to her, because it is indispensable to the "use and enjoyment" of her real estate. Here a liability is fastened upon her by construction, in order that she may keep her real property fit for the use or enjoyment; a construction that she has the power to let others use and enjoy it is almost an inevitable consequence.

We should have had no difficulty in reaching the conclusion just indicated, but for the case of *Miller vs. Harbert*, 6 Phila. Rep. 531, a

decision of our own court, which was affirmed in the Supreme Court; but no opinion was delivered there, nor was an order made that it should be reported; nor is it anywhere reported or cited as a decision of that court. The language of the opinion of this court was, "that the lease of the land of a *feme covert*, either for a *longer* or a *shorter* term, must, in order to be valid, be acknowledged by her separately and apart from her husband;" the case as disclosed by the bill of exceptions was of a lease for *three* years, with no evidence that a letting for that period was indispensable to the "enjoyment" of the property by the lessor, and therefore was not a "disposal" of the property.

We can only say of this case, that as to its facts it differs from the case now under adjudication, and that as to the language of the opinion, it is not in accord with the views of the majority of this court at this time.

The very learned and usually accurate judge who tried the case and delivered the opinion fell into the error of construing the act of 1770 as though it made an acknowledgment by a married woman essential to the validity of *every* lease, when it is clear and express that it applied to such leases only as were made "with intent to dispose of and convey."

Had the distinction now taken between disposal and enjoyment been submitted to him, we feel satisfied that he would not have said that the act of 1770 applied to all leases, without regard to the length of the term or the purpose observed by them.

The learned judge, in a recent case (*Bond vs. The Insurance Company*, 30 Legal Intelligencer, 304), has expressed views even in advance of those herein above indicated. There, upon the contention that, since the act of 1848, there could be no transfer of a wife's *personal* property without the concurrence of the husband and an acknowledgment before a justice of the peace, he well observes: "such a rule would render it impracticable for a married woman to dispose of her stocks and furniture, or even to make the smallest present without calling in a justice of the peace or notary public. Nay, more, the restriction would extend to purchase, because it is impossible to buy without giving an equivalent. It has not been imposed in terms, and we may believe that the court above will do some gentle violence to the act of 1848, rather than adopt a conclusion fraught with injurious consequences."

Substantially, this was holding that, as to personality, "use and enjoyment" in the act of 1848 included the power of absolute "disposal;" in the case before us, we hold merely that, as to her realty, use and enjoyment by a married woman necessarily include the power to lease it for a term of one year.

If it is asked, to what length of term the lease of a married woman shall be limited, the answer is, to that length which the "use and enjoyment" of her realty demands—no more. A lease for any greater term is, as to the excess, a "disposal," and the provisions of the act of 1770 must be applied to it. What length of term is necessary to the enjoyment of real estate is a question of law or of law and fact, depending upon circumstances. The courts, taking notice of the immemorial habits of the people, will say, as matter of law, that dwellings, ordinary business premises, farms, etc., cannot be ordinarily leased for a less term than one year. Some mining and manufacturing properties may not be leased to ordinary advantage except upon much longer terms. In these

cases the question would be for the jury. But whatever the length of term, the lease would be valid, if the premises could not be rented to ordinary advantage for a shorter term.

The same principle would rule the question of the liability of a married woman upon her contract for the improvement of her real estate. If it could not be rented to ordinary advantage, without improvement, her right to enjoy would include the right to make such *necessary* improvement; and the liability would inure from the right.

THAYER, J.—I concur in the judgment but not in the reasons which have been assigned for it. I prefer to rest the decision upon the doctrine of estoppels *in pais*—a doctrine which, although it originated in chancery, is now fully adopted by courts of law, and is found to be not only beneficial, but absolutely essential for the prevention of fraud and injustice. It is accordingly now well established that when an act or statement cannot be withdrawn without a breach of faith on the one hand and an injury on the other, such an act rises from the rank of evidence to that of an estoppel, and absolutely binds and concludes the party affected by it. Very many examples and illustrations of this are to be found in the numerous cases cited in the very elaborate and learned notes to *Doe vs. Oliver*, 2 Smith's Leading Cases, 711 *et seq.* This kind of estoppel is applicable to *feme covert*s and infants, as well as to others, for it could not be tolerated that such persons should be allowed to injure others with impunity. 1 Story Eq., sec. 385; *Fitz vs. Hale*, 9 N. Hamp. 441; *Evans vs. Bicknell*, 6 Vesey, 174, 181; *Godey vs. Rodman*, 6 Indiana, 269; *Drake vs. Glover*, 38 Ala. 382; *Mount vs. Morton*, 20 Barb. 123; *Barham vs. Taberville*, 1 Swan, 437; *Whittington vs. Wright*, 9 Georgia, 23; *Davis vs. Tingle*, 8 B. Munroe, 543; *Wright vs. Arnold*, 14 B. Munroe, 658.

In Pennsylvania this doctrine has been applied in several cases to married women. In *Fulton vs. Moore*, 1 Casey, 468, a married woman united with her husband in a conveyance for a valuable consideration, but her deed was not separately acknowledged. She and her heirs were held to be estopped by her conduct from taking advantage of the defect in the conveyance. "If," said Lewis, J., "Dorcas, instead of asserting her title at the proper time, permitted the property to be divided among the heirs of Jacob Cooper, she herself being one of them, it is her own fault. After Mrs. Lynn had sold the farm to Nichols and received the consideration for it, it is easy to perceive the motive which she and Dorcas, as heirs of Jacob Cooper, might have to treat the house and lot as still belonging to his estate, and to divide it among the heirs after it had already been sold for his debts. They may perceive no dishonesty in such a transaction, but it appears to me that a chancellor or a judge governed by the principles of equity would take a very different view of the matter."

In *McCullough vs. Wilson*, 9 Harris, 436, a married woman was held to be estopped from taking advantage of an invalid mortgage of her separate estate, because she had procured a person to purchase the mortgage. In *Couch vs. Stratton*, 1 Grant's Cases, 114, a married woman was estopped by the same principle. And in the *Commonwealth vs. Shannon*, 6 Harris, 343, a minor was estopped by receiving the proceeds of a void sale. And

so in *Smith vs. Warden*, 7 Id. 424; *Keen vs. Coleman*, 3 Wright, 299, and *Keen vs. Hartman*, 12 Ib. 497, are not in conflict with these cases; for there is a wide difference between enforcing by action against a *feme covert* a contract which is contrary to law, however equitable may be the claim against her, and permitting her to become an actor in a suit by which courts of justice are asked to lend themselves to the consummation of a fraud. Against such an attempt a court of law ought to set its face as steadfastly as a court of equity, especially where, as with us, equitable principles are applied by courts of law as liberally as by the hands of a chancellor. Wherever a court of equity would refuse relief to a *feme covert* plaintiff because of the dishonesty of the case she sets up, there she ought also, in Pennsylvania, to be turned away from the courts of law.

In the case now before the court, a married woman having received in advance from the defendant a large pecuniary consideration for a lease of the premises for a year, seeks to deprive him of the possession for which he has paid, and the price of which she retains in her own pocket.

I see no reason to doubt the correctness of the decision of this court in *Miller vs. Harbert*, 6 Phila. Rep. 531. The only point there decided was, that a lease by a *feme covert*, either for a longer or a shorter term, must, in order to be valid, be in writing, and separately acknowledged by her. No question of estoppel appears to have been raised in that case. But I can entertain no doubt whatever, in view of the decision of the Supreme Court, in *Fulton vs. Moore*, that a married woman may estop herself by her conduct from setting up such a defect against a title, which must be held to be good unless she is permitted to take advantage of her own wrong and to practise a fraud upon her tenant by accepting and retaining the price of the occupancy while in the very act of repudiating the lease. It would, in my opinion, be a reproach to justice, if she should be permitted to turn her tenant out of the possession for which she has been paid, and that without offering to return the money she has received. I think the nonsuit was properly entered.

Hare, P. J., and Mitchell, J., dissent.

A. V. Parsons, Esq., for plaintiff.

S. Davis, Esq., for defendant.

[Leg. Int., Vol. 30, p. 108.]

COSTELLO vs. GOLDBECK *et al.*

A real estate broker who has not taken out a license as required by the act of April 10, 1849, cannot recover commission.

Rule for a new trial. Opinion delivered March 29, 1873, by *

BRIGGS, J.—The plaintiff is an unlicensed real estate broker, and as such seeks to recover commissions alleged to be earned by him in the transaction in suit on the defendants' account.

Has he such right of recovery?

By the provisions of section 18 of the act of April 10, 1849, to create a sinking fund, etc., real estate brokers are subject to the same penalty which the act of May 27, 1841, imposed upon stock and bill brokers. The fifth section of the latter act is as follows: "No individual or

copartnership, other than those duly commissioned under the provisions of this act, shall use or exercise the business or occupation of a stock or exchange broker, under a penalty of \$500 for each and every offence," etc.

In *Chadwick vs. Collins*, 2 C. 138, the court left the question an open one as to whether the act was prohibitory, as the services claimed in that case were not rendered by a real estate broker. Nor are we aware of any decision upon this act expressly declaring it to be prohibitory. It nevertheless appears to us that it must be so, as the imposition of the penalty is not to be construed into a license for prosecuting the business, subject to the penalty, but as expressive of the sentence of the law's condemnation of the illegal act; for the penalty can only be imposed upon the ground that the act for which it is inflicted is forbidden, and in itself it implies a prohibition, though there are no prohibitory words in the statute. *Mitchell vs. Smith*, 1 Bin. 118. It hence legally follows that the plaintiff's right of recovery is as effectually forbidden by the act of April 10, 1849, as it could be were words of express prohibition written in the statute. *Burkholder vs. Beetem*, 15 P. F. Smith, 505; *Reading Manufacturing Company vs. Graeff*, 14 P. F. Smith, 402; *Chadwick vs. Collins*, 2 C. 138.

It is true that the statutes involved in the decision of the last mentioned cases expressly prohibit the forbidden acts, and in this respect they differ from the one invoked in defence to the plaintiff's claim. We nevertheless think, for the reasons above given, that the prohibition is as strongly to be inferred as it could be had express language been employed to that effect.

The rule for the new trial is discharged and judgment entered for the defendants, notwithstanding the verdict, on the point reserved.

Geo. H. Earle, Esq., for plaintiff.

Thomas J. Clayton, Esq., for defendant.

[Leg. Int., Vol. 31, p. 28.]

DYER vs. THE PEOPLE'S BANK.

A creditor who denies in his answer a married woman's title to real estate, and alleges that the property belongs to her husband, will not be enjoined from levying on it and selling it as the husband's property. Under such circumstances a court of equity will not investigate the title but leave the parties to contest it at law.

In equity. Motion for a preliminary injunction. Opinion delivered January 17, 1874, by

THAYER, J.—The plaintiff is a married woman, and it appears by the bill and affidavits filed that the defendants, having recovered a judgment against her husband have issued a *fi. fa.* against him under which there has been a levy and condemnation of a lot of ground which is alleged to be the sole and separate estate of the wife, and the defendants are about to have the same sold upon execution by the sheriff. She therefore seeks to enjoin the defendants from so doing. The bill sets forth very minutely the manner in which the plaintiff's title was derived, and the payment of a portion of the purchase-money by the plaintiff out of her separate estate. The answer, while it does not explicitly deny all the material allegations of the bill, nevertheless

denies the fact of the wife's ownership, controverts her title, and alleges that the real ownership is in the husband. It charges that the property in question was conveyed to the plaintiff by Joseph Shantz about six weeks after a conveyance had been made to him by the husband of the plaintiff. That at the time of the conveyance the husband was insolvent, and that the property is worth much more than the plaintiff alleges she paid for it.

The plaintiff relies on *Hunter's Appeal* (4 Wright, 194). But it is to be observed that the circumstances under which *Hunter's Appeal* was decided were peculiar. In that case there was no denial of the wife's title and ownership. The defence was rested solely upon the ground that the injunction ought not to be awarded because the plaintiff had an adequate remedy at law by defending her title in an action of ejectment, to which the sheriff's vendee must be put in order to assert his right to the possession. The present case is quite different. Here the wife's title is peremptorily denied, and facts averred which, to say the least, bring its validity in question and throw upon her the burthen of establishing by competent evidence that it was fairly and honestly acquired by her own separate means. Such an inquiry, by the practice of the courts of this State from the foundation of the Commonwealth, has always been conducted through the instrumentality of an action at law and the verdict of a jury. Where her title is denied a married woman cannot prevent her husband's creditor from contesting her title in the usual manner, or withdraw the decision of the facts from a jury by means of the summary process of a court of equity. If anybody has supposed that *Hunter's Appeal* is an authority for awarding an injunction, except in cases where the wife's ownership is not denied, he must correct his judgment by *Winch's Appeal* (11 P. F. Smith, 424), where the limits of the former decision are strictly defined, and the wife is remitted to the old remedy in all cases in which her title is challenged by her husband's creditor.

Motion dismissed.

Silas W. Pettit, Esq., for the motion.

Charles Gilpin, Esq., contra.

[Leg. Int., Vol. 30, p. 432.]

KUEHLING *et al.* vs. LEBERMAN.

Depositions taken by a foreign tribunal under letters rogatory issued by this court will not be rejected because it appears that the plaintiff's attorney attended at the taking of the depositions, it appearing that such attendance was in conformity to the usual course of procedure of the foreign tribunal in such cases.

Exceptions to execution of letters rogatory.

The defendant, by his attorney, excepts to the form and execution of letters rogatory issued out of this court in above case on behalf of plaintiffs, and filed September 15, 1873, and now makes the following specifications of such exception:

1. The execution of the said letters rogatory is illegal and void in that it appears that the attorney and counsellor of the plaintiff was present at the taking of the depositions of witnesses.

2. The form and execution of said letters rogatory are illegal and

void, inasmuch as the exhibits or papers directed to be shown to the witnesses in the interrogatories exhibited by plaintiffs did not form part nor were they attached to the letters rogatory by this court.

3. The form and execution of the said letters rogatory are illegal and void because there are attached to the execution of the said letters rogatory different papers, purporting to contain copies of orders, minutes, directions, and other matters not forming part of or belonging to the execution of the said letters rogatory.

Argument of plaintiffs against the exceptions.

First Exception. The proceedings are in a foreign court, and as a court does not proceed of its own motion, an attorney must appear to represent a party exactly as if the case had not been sent to another court for its co-operation; the defendant had the right to appoint an attorney in the foreign court to represent him, and see that his interests were guarded.

The attorney followed the practice of his country, the only practice known to the foreign court. We cannot dictate the method to be pursued by a court which we beg to act for us out of courtesy, but the presence of an agent who took no part in putting questions would be no ground of objection even to a commission. 1 Tr. & H. 525; *Otis vs. Clark*, 2 Miles, 272.

As this is a question of practice, it comes under the general head of objection raised by the third exception.

Third Exception. The practice of the foreign court is the law of procedure. Letters rogatory, unknown to common law, are derived through admiralty from the civil law. They promise to reciprocate the courtesy which they ask, and our statutory provisions assimilate the course of procedure in the execution of letters rogatory addressed to us, to the ordinary practice of our courts: act of April 8, 1833, secs. 18, 19, 20 & 21, Pamphlet Laws, 308, Purdon, 623. This establishes our recognition of the principle that the law of the country to which the letters are addressed governs the procedure to be adopted in executing them; this is the civil law. Fœlix says: "In that which concerns the provisions *ordinatorie litis*, that is to say, the mode of calling the witnesses and parties before him, the forms of making up the report, etc., the judge ought to observe the laws of his country." 1 *Traité du Droit International Prive*, 476, s. 276, *ad finem et seq.* The civilians make a distinction, which corresponds to our division of form and substance between the forms and regulation and the merits, "between *ea quæ litis formam concernunt ac ordinationem* and *ea quæ spectant decisoria causæ et litis decisionem*." "There are," says Merlin, "two sorts of judicial formalities, some which pertain only to the trial (*l'instruction*) and are relative only to the procedure, for which reason the jurists call them *ordinatorie litis*; the others, which pertain to the merits of the case, the omission or absence of which neutralizes or destroys the action, and which the jurists designate by the words *decisoria litis*." 1 Fœlix, 453, s. 233. The admiralty practice is stated in all the text-books to be the same as above indicated in the civil law. "If these letters rogatory are received by an inferior judge he proceeds to call the witnesses before him by the process commonly employed within his jurisdiction, examines them on

interrogatories, or takes their depositions, as the case may be; and the proceedings being filed in the registry of his court, authentic copies thereof, duly certified, are transmitted to the court *a quo*, and are *legal evidence* in the cause." Conkling's U. S. Admiralty, 294, citing Hall's Admiralty Practice, Conkling's Treatise, 601; *verbatim* in Benedick's Admiralty, s. 533; return in same manner prescribed by U. S. in Admiralty, 1 Abbott's U. S. C. Practice, 84. There has been so little doubt upon the point that but one case has arisen under letters rogatory in the United States, and in that, Judge Washington clearly indicates the distinction which separates commissions from letters rogatory, though the case did not require him to define its extent. *Nelson vs. The United States*, 1 Peters' C. C. R. 237.

Second Exception. The instructions are not attached, nor need other documents be attached by the court. The reference to the original judgment did make it a part of the letters as completely as if it had been attached physically, and if the attorney for defendant had thought it not properly a part of the document he should have moved to strike it out. 1 Tr. & H. 521. The doctrine of relation by reference needs no authority, it is too well established. The identity of the document is sufficient. *Dodge vs. Israel*, 4 W. C. C. R. page 323. The sentences could not be attached, for they had not yet become a part of the record, and were only referred to as judicial proceedings in Germany, which might become part of the case if the witnesses should show any connection between this suit and the sentences of Meyer Leberman and his sons. No exhibits or documents are mentioned, and if the question had been irrelevant, the defendant's attorney might have moved to strike it out. 1 Tr. & H. 521. Now that the connection has been proved, it is too late for any objection. *Hill vs. Canfield*, 13 Smith, 77.

Opinion delivered December 20, 1873, by

THAYER, J.—In *Hollister vs. Hollister*, 6 Barr, 449, the Supreme Court, adopting the rule of the English Chancery Courts, which prohibits the attorneys of the parties from being present at the taking of depositions under a commission, affirmed the ruling of the court below which had rejected depositions taken by commissioners where it appeared that the attorney of one of the parties had been present and that no notice of the time and place of the taking of the depositions had been given to the other party.

The principal exception in the present case is, that the plaintiff's attorney was present when the letters rogatory were executed. These letters were issued by this court, and addressed to any judge or tribunal having jurisdiction of civil causes at the city of Schweinfurt, in the kingdom of Bavaria, and empire of Germany. They were executed with great ceremony and solemnity by the Royal Circuit Court at Schweinfurt, in Bavaria. By the minutes of the proceedings, duly certified, which have been returned to us, it appears that on a certain day the royal attorney, Wolfsthal, acting on behalf of the plaintiffs, filed an information and motion in the Royal Circuit Court, at Schweinfurt, in Bavaria, praying them to execute the letters rogatory. Thereupon the court ordered the depositions to be taken by the commissioned Judge Craemer, who appointed a day for that purpose, and notified the plaintiffs' attorney,

Mr. Wolfsthal, to attend at the time and place stated. Mr. Wolfsthal appeared accordingly and produced before the judge commissioned to take the depositions a decree of the Royal Bavarian Court of Appeals for Lower Franconia and Aschaffenburg, dispensing with the oath of secrecy on the part of the witnesses (who were royal counsellors of the Circuit Court)—a dispensation which appears from the papers to have been necessary before the witnesses could be permitted to answer the plaintiffs' sixth interrogatory.

The commissioned judge then proceeded to administer the interrogatories and to receive the answers of the witnesses; at the conclusion of which, he adds: "Whereas the legal representative of the plaintiffs, the royal attorney, Wolfsthal, after reading these present minutes for himself, had not any further motion to offer, the above proceedings have been closed and the same caused to be signed by him for confirmation." Whereupon, the attorney, Wolfsthal, signed the papers in obedience to the requisition of the judge.

I have thus noted with some particularity the proceedings of the foreign tribunal, in order that the precise extent of the participation of the plaintiffs' attorney in those proceedings might appear.

It is to be observed that there is a very broad distinction between the execution of a commission and the procuring of testimony by the instrumentality of letters rogatory or letters requisitory, as they are sometimes called. In the former case the rules of procedure are established by the court issuing the commission, and are entirely under its control. In the latter, the methods of procedure must, from the nature of the case, be altogether under the control of the foreign tribunal which is appealed to for assistance in the administration of justice. We cannot execute our own laws in a foreign country, nor can we prescribe conditions for the performance of a request which is based entirely upon the comity of nations, and which, if granted, is altogether *ex gratia*. "We therefore request you that, in furtherance of justice, you will, *by the proper and usual process of your court*, cause such witnesses to appear before you, and there to answer," etc., etc. This is the formula in which the letters are couched. We cannot dictate the methods to be pursued by the court whose assistance we invoke. The rules and practice of the foreign court must be the law of procedure in such cases. Letters rogatory were unknown to the common law. They came to us from the civil law, though the admiralty courts and the civilians seem to agree that in all that concerns the forms of procedure in such cases, the judge ought to observe the laws of his own country. We may therefore adopt in the present case the language of Judge Washington, in *Nelson vs. The United States*, 1 Peters' C. C. R. 237: "Where the business is taken out of the hands of persons appointed by this court, the ends of justice seem to require a departure, in some degree, from the ordinary rules of evidence. To what extent this departure would go has never yet been decided in this court, and it is not necessary at present to lay down the limitation." Doubtless, if it should appear that any of the substantial requisites of justice, as we administer it, had been omitted, or any unfair advantage given to either party, we would reject the depositions, no matter what solemnities of form had attended the taking of them. But under the circumstances attending the execution of these letters

rogatory by the Royal Circuit Court at Schweinfurt, we cannot regard the attendance of the plaintiffs' attorney as a circumstance of that character. He appears to have attended in pursuance of a notification of the judge who took the depositions, and was required by him to verify them by his signature. It thus very plainly appears that his attendance was altogether in conformity with the rules of procedure in the foreign tribunal, and the character of the court which executed our request affords ample assurance that his presence was not permitted in any degree to prejudice the defendants' rights.

The other exceptions require no discussion.

Exceptions dismissed.

Samuel B. Huey and James Parsons, Esqs., for plaintiffs.

Edward H. Weil, Esq., for defendant and exceptant.

[Leg. Int., Vol. 30, p. 4.]

MOORE & Co. vs. THOMPSON & CASSERLY.

1. It is an agent's duty to give his principal timely notice of every fact which may make it necessary to take measures for his security.
2. In a foreign attachment, when the garnishee is the plaintiff and the defendant's agent, he should give him notice of the proceedings.
3. The defendant may testify as to the value of the goods in the garnishee's hands.

Rule for a new trial. Opinion delivered *December 27, 1873*, by

BRIGGS, J.—The main contention here is, whether it was error to permit the defendants to prove the value of the goods in the plaintiffs' hands. They received them as the agents of the defendants, and so held them at the time they issued the writ of foreign attachment, naming themselves as garnishees. They gave the defendants no notice, either of the attachment or of the order to sell the goods as perishable.

Without deciding whether in a case of no agency an order of sale in proceedings in foreign attachment without notice is conclusive upon the defendant, we are of opinion that in this case it was the duty of the plaintiffs, as the agents or consignees of the defendants, to have given them notice of the attachment. Clearly it would be their duty to do so, were others the plaintiffs and they the garnishees, and *a fortiori* it became their duty to do so the moment they put themselves in a position hostile to their principals. In *Clark & Co. vs. The Bank of Wheeling*, 5 H. 324, the court said: "It is an agent's imperative duty to give his principal timely notice of every fact or circumstance which may make it necessary to take measures for his security;" and in *Brown vs. Arrott*, 6 W. & S. 416, if by his neglect to do this the principal suffers loss he is entitled to be indemnified by the agent.

Applying the principle of those cases to the one we are considering, it was the plaintiffs' duty as defendants' agent to have given them notice of the attachment; and not having done so they are liable to them for the loss they have sustained by neglect of that duty; and in order to ascertain the extent of that loss it became necessary to admit the testimony objected to. Such testimony would be admissible in an action by the defendants against the plaintiffs for neglect in not giving them notice that they had attached the goods, and under our defalcation act, the

defendants waiving the tort. *Pearsol vs. Chapin*, 8 Wr. 17, was properly admitted in this case by way of set-off.

Rule discharged.

Wm. F. Johnson, Esq., for plaintiff.

Joseph Hanson, Esq., for defendant.

[*Leg. Int.*, Vol. 30, p. 4.]

COOPER vs. ABRAHAMS.

After verdict the exceptant, on a motion for new trial, is confined to the grounds of error assigned at the trial.

Rule for a new trial. Opinion delivered *December 27, 1873*, by

BRIGGS, J.—We are satisfied with the verdict in this case, both upon the weight of evidence and as to the damages. The contradictory testimony given to the jury made the case peculiarly one for their determination. At first thought the damages may seem excessive; but when we consider the plaintiff's imprisonment, the trouble and inconvenience to which he was subjected in attending his trial, and the hazard he ran of conviction and imprisonment for a term of years, we cannot say the verdict is too large.

Testimony was admitted on behalf of the plaintiff showing his suffering from cold while in the station-house, and the deprivation of food for more than twenty-four hours. The jury were also instructed that these were elements of damage which they might consider if they found for the plaintiff. The defendant's counsel objected and excepted to the admission of this testimony and instruction, and in his argument in support of his objection, assigned as the sole reason, that the damages covered by the objection were payable by the city, and that the defendant was in nowise liable for them.

His motion and objection were ruled upon that ground alone. He now assigns as an additional reason for error that the pleadings nowhere allege injury from such cause, and hence he was not called upon to answer or rebut such testimony. The reply to this is, it is now too late to make such a point, as it was not raised at the trial and the judgment of the court invoked upon it. No allusion whatever was made to a variance between the testimony offered and the narr. Had the objection been put upon that ground the plaintiff would have had an opportunity to amend and thus cure the omission. In *Miller vs. Miller*, 4 B. 317, an exception, not taken at the trial, was made to the admission of a note dated February 27, 1843, payable in twenty days after date, because the narr alleged a contract of loan for one year from February 27, 1843, to February 27, 1844. The court in passing upon the exception said: "But granting that it is as stated in the point, it amounts to a variance between the declaration and the proof for which no specific direction was prayed, and having omitted to point the attention of the pleader to the fact, he cannot now assign the variance for error. Had the variance been pointed out at the trial, the plaintiff would have had the right to amend, an advantage of which he is deprived by the course taken by the plaintiff in error."

It is too well settled in this State to need elaboration, that after verdict the exceptant is confined to the ground of error assigned at the

trial. *Mills vs. Buchanan*, 2 H. 59; *Lovett's Executors vs. Mathews*, 12 H. 330. Even without the aid of those authorities we are of the opinion that the statements of the narr are broad enough to cover the objection, as it contains this general allegation: that the plaintiff while in prison suffered great anxiety and *pain of body and mind*.

This remits us to the point taken by the defendant's counsel at the trial. Is he correct in that? The verdict establishes the fact that the defendant maliciously, and without probable cause, procured the plaintiff's arrest and imprisonment. Can the defendant, with this sentence against him, say to the person he has injured: "You must look to another contributor to your injuries for partial redress, notwithstanding, except for my wrongful and malicious act you would have sustained no injury at all."

Was not all of the plaintiff's suffering in prison inseparably connected with the defendant's act in putting him there? That it was is shown by the fact that we cannot separate the plaintiff's injuries from his imprisonment, nor his imprisonment from the defendant's wrongful act. It is true that the plaintiff might have maintained an action against the city for its neglect, but that is because it was a contributor to his injury, and not because the plaintiff, as the other and primal wrongdoer, was not also liable. It is settled beyond all doubt that the injured party may proceed against any or all of the wrongdoers; and to maintain that the defendant is not liable for all of the injuries flowing from his wrongful conduct to the plaintiff is a refinement not sanctioned by law.

There is nothing in the depositions showing after discovered testimony. Rule discharged.

P. T. Ransford and Jas. H. Heverin, Esqs., for plaintiff
Wm. L. Hirst, Esq., for defendant.

[Leg. Int., Vol. 31, p. 12.]

HEY vs. THE CITY.

It is not negligence in the city, that there is no fence or guard to the park highway along the Schuylkill near the bridge of the connecting railway.

A rule for a new trial, and motion for judgment on points reserved. Opinion delivered *January 3, 1874*, by

HARE, P. J.—The plaintiff was returning to the city from a drive in the east park. A turn in the road brought him to the margin of the Schuylkill, and in full view of the bridge of the connecting railway. He had the stream on one side, and a high bank of rocks or earth on the other. The road was wide and level, but there was a sharp declivity towards the river, with no guard or protection except a sidewalk raised some six inches above the road. A train was passing over the bridge, and the plaintiff's horse took fright. He got out, took the animal by the head and turned it towards the bank. The horse continuing restive, the plaintiff got on a rock to obtain a better hold, but lost his footing and fell between the forefeet of the horse. The animal freed from all restraint turned short round, overset the wagon, sprang across the sidewalk into the river, and was drowned. The plaintiff contended that the city was guilty of negligence in not erecting a guard between the road

and the stream, and that the accident was attributable to that cause. The question was left as one of fact to the jury, and the law reserved for the consideration of the court.

The question may be considered under two heads: First, is there evidence of negligence in the construction of the road? and next, did that negligence occasion the loss? I have found it exceedingly difficult to arrive at a satisfactory conclusion on either point. That the city is responsible for maintaining her highways in a safe condition, and that the question whether a particular highway is safe, must ordinarily be left to the jury, are propositions which no one is likely to dispute. It is also clear under the authorities, that when the road is steep or narrow, with a river, ravine or ditch at the side, a fence or barrier should be erected of sufficient height to prevent vehicles from being forced off the road by any sudden or ungovernable movement of the animals by which they are drawn. But I am not prepared to admit that this precaution must be observed where the way is level, and there is no reason to suppose that an accident will occur with horses that are obedient to the whip and rein. One who drives a horse which cannot be controlled under ordinary circumstances, and where there is no peculiar cause of alarm, takes the risk, and cannot justly ask compensation if an accident occurs. If this were the whole case, I should incline to think that the question should have been withdrawn from the jury. But there are other circumstances which require consideration. At the point where the accident occurred, the road crosses one railroad track at grade, and then passes almost immediately under another. There are sights and sounds which may excite or alarm a horse that is ordinarily quiet and well broken. There is no other convenient means of access to a park which has been laid out for the health and recreation of the citizens. It was, therefore, the duty of the park commissioners to anticipate the danger arising from the proximity of the tracks and take more than ordinary precautions against the accidents which the situation was calculated to produce.

We have still to consider whether the negligence of the defendants was a proximate and efficient cause of the injury for which the plaintiff seeks to recover. The accident originated in causes over which the city had no control, and for which she is not answerable. These were: first, the passage of the railway train; next, the ungovernable temper of the horse; and finally, the plaintiff's fall, which left the animal without a master. Up to this point there is certainly nothing for which the city can justly be held answerable.

Does any responsibility attach for what ensued? A horse which breaks loose from its driver and runs away, under the impulse of fear, becomes, for the time being, a blind brute force. His course is less susceptible of calculation than that of the winds or waves, or of the melting snows on a mountain. Whether he receives or occasions injury, the presumption is, that no one is answerable. To entitle the owner to compensation from the public purse it should distinctly appear, not only that the authorities were negligent in the construction of the highway, but that the injury would not have been sustained but for their default. This can hardly be alleged in the present instance. In view of what might have happened, we may regard the actual result as fortunate. It

is contended, that if the side of the road had been guarded by a fence, the horse would not have been drowned. The soundness of this inference is questionable, because a creature in such a state of terror might have surmounted any ordinary barrier. If accepted as just, it would not aid the plaintiff. The horse would, in all probability, have sped down the road and been brought into collision with the archway of the bridge, or some passing vehicle. Nor is this all; in such a crowded thoroughfare, human life might have been sacrificed. If it be said that this is speculative, and that the inquiry, whether the want of a safeguard was an efficient and concurrent cause, was one of fact for the jury; the answer is, that guessing is no part of the judicial function, by whomever exercised. The plaintiff must present some ground on which the mind can proceed with certainty to judgment. If he fails in this he is not entitled to a verdict. This may sometimes be unfortunate; but the evil would be greater if the jury were permitted to draw inferences at random.

It is established, in *Maine vs. Massachusetts*, that no recovery can be had for an accident occasioned by a frightened or vicious horse, although it might not have occurred but for a defect in the highway at the point where the horse is injured, or the carriage broken. *Davis vs. Dudley*, 4 Allen, 557; *Titus vs. Northbridge*, 97 Mass. 258; *Fogg vs. Nahant*, 98 Id. 578; *Moulton vs. Sanford*, 51 Maine, 127; *Moore vs. Abbott*, 32 Id. 66. Agreeably to these authorities, if the horse was unmanageable when the accident occurred, it is immaterial, so far as the public liability is concerned, that the driver kept his seat and the reins, and might have regained his control over the animal.

I incline to think that as long as the struggle between the human and brute will continues, and there is a possibility that the man may prevail, he is entitled to protection against any default tending, although incidentally, to turn the scales. See *Lower Macungie Township vs. Merkhoffer*, 21 P. F. S. 276. But the point does not arise in this instance, where the occupants of the carriage were all precipitated to the ground before the horse made the plunge which led to his death.

Judgment is entered for the defendant on the points reserved.

Richard P. White, Esq., for plaintiff.

City Solicitor *Coltis* and *R. N. Willson, Esq.*, for city.

[Leg. Int., Vol. 31, p. 12.]

THE CITY OF PHILADELPHIA vs. BROOKE.

The contractor for paving a street must comply with the terms of his contract, and cannot recover, when the work was done at an improper season, and proved defective in consequence.

A rule for a new trial. Opinion delivered *January 3, 1874*, by

HARE, P. J.—This is a suit by the city of Philadelphia to the use of John Dyer to recover the amount alleged to be due for pavement laid by him in front of the defendant's premises, under a written contract with the city. The instrument, as produced in evidence, contained the following proviso: "This agreement shall not be construed to allow paving to be done after the first day of December, and before the first day of April in any year." It was proved at the trial that the pave-

ment in question was laid during the month of December, while the ground was hard-bound with frost. The defendant having remonstrated without success, complained to the highway department, which notified Dyer to desist. He obeyed, although not until after the street before the defendant's land had been paved. As might have been anticipated, when the ground thawed in spring, the pavement proved to be entirely unfit for use. Dyer returned and relaid the stones in some places, and rammed them down in others, but there is no proof or allegation that he did the work over again as a whole; and it is, on the contrary, manifest that a large part of the street remained in the condition in which it was originally left. The jury were instructed that if the material and substantial part of the work was done in the month of December the plaintiff was not entitled to recover. The verdict was in accordance with this instruction, and the plaintiff now moves for a new trial.

If this were an ordinary suit for work and labor done and materials furnished, the instructions given at the trial might be questionable. It is no doubt true, that he who seeks to enforce an executory contract must show that he was ready and willing to comply with its requirements; but this rule is not necessarily applicable where the contract has been so far executed as to confer a substantial benefit on the defendant. It is well settled that one who accepts a benefit, although differing from that for which he stipulated, must render an adequate compensation. A promise is implied in order to prevent a failure of justice. It does not follow that such an obligation will arise where there is neither knowledge and assent, nor a substantial fulfilment of the contract. In a suit brought in this court some ten or twelve years since, to recover for paving the sidewalk of a house, the defence was, that the work had not been done within a reasonable time. It appeared at the trial that the request had been made in the autumn, and the bricks laid in the ensuing March. The defendant offered to prove that he had conveyed the house during the interval. This evidence was excluded on the ground that if the work was done in due season the plaintiff was entitled to a verdict, and if it was not, it mattered not whether the defendant was or was not benefited. The District Court refused a new trial, and the judgment was affirmed by the court above. This case, perhaps, went too far in holding that a service rendered after the appointed time is not a ground of recovery, unless there is some evidence of waiver or consent. And it may well be that where the default is not wilful and admits of compensation, equity will give relief on a principle akin to that which governs the specific execution of contracts for the sale of land.

The case before us is free from these difficulties. It is not alleged that a service was rendered to the defendant, or at her request. What the plaintiff did was to pave a public highway, under a contract with the city. This contract was as obligatory on the defendant as if she had put her hand to the instrument, but it was the only source of her obligation. She was, therefore, in the position of a surety, who not sharing in the consideration will be discharged by a variation from the contract. It is not denied that such a deviation occurred in this instance. Time was of the essence of the agreement, not merely by its terms, which were precise, but from the nature of the subject-matter. A stipulation that paving shall not be done after the beginning of December, and before

the first of April, needs no explanation. The object is to insure the firm foundation, which cannot ordinarily be had during the winter months. It was wilfully disregarded by the plaintiff, with no better excuse than his own convenience. The default was not merely formal, but substantial, because the road-bed was prepared and the pavement laid during a hard frost, and notwithstanding an urgent remonstrance from the defendant. It is doubtful whether a recovery could be had, in the face of such evidence, if the work had been done on the defendant's land or for her use. It is an established rule, that no one can be compelled to accept a performance differing in any material particular from that for which he agreed. Still, if the pavement had been laid on ground belonging to the defendant, there might have been a rude justice in compelling her to pay what it was worth. But as the case actually stands, she is not benefited by the consideration, and the plaintiff can only recover on the contract, which, as we have seen, was deliberately violated.

The case is so clear on this ground, that the plaintiff falls back on the allegation that the breach had been condoned by the highway department, and could not be set up by the defendant. It may be, although I am not prepared to adopt the proposition, that the highway department might have varied or dispensed with the provisions of the contract while the work was going on. If such a waiver is valid in any case it must be good in all, without regard to the subject-matter, or the nature of the change involved. But I need not pause on this inquiry, because if the power exists it must be exercised by the department as such, and in a way to fix the responsibility where it properly belongs. The assent of the authorities should be shown by some official act or memorandum, and not left to inference, or gathered from declarations that may never have been uttered. But the point does not arise in this instance, because there is not a particle of evidence that the department sanctioned the deviation from the contract; and it is on the contrary proved and admitted, that when the chief commissioner of highways ascertained that Dyer was paving in such weather, he ordered the work to be stopped. It cannot be successfully maintained that the subsequent approval of the bill by the district surveyor cured the breach, or gave the plaintiff any greater right than he already possessed. It would not do so if the suit were against the city, and certainly cannot have that effect where the interests of a third person are in question. Such an admission may be *prima facie* evidence, but it will not operate as an estoppel or preclude any valid defence.

The rule for a new trial is discharged.

MITCHELL, J., dissents.—I am unable to concur in this judgment. The provision against doing the work in December was merely directory, and under the entire control of the highway department. The fact that it was done in a forbidden month was part of the evidence to go to the jury to show that the work was not properly done, but it did not of itself bar a recovery. The instruction to the jury in my opinion was too binding, and the rule should be made absolute.

John R. Read and Silas W. Petit, Esqs., for plaintiff.

Edward H. Weil and Isaac Gerhart, Esqs., for defendant.

[Leg. Int., Vol. 31, p. 12.]

CITY OF PHILADELPHIA TO USE OF BLIGHT *et al.* vs. SCOTT.

Before private property can be taken or charged, even under the police power of the State, there must be an *adjudication* by some tribunal authorized by law, upon the facts which render the taking proper.

The act of March 25, 1848, "to provide for the repairs of the meadow banks upon the Delaware front in the county of Philadelphia," is unconstitutional.

This was a *scire facias* on a claim for "work and labor done, and materials, consisting of boats, lumber, hardware, mud, stones, hay, etc., furnished and used within six months, between 16th of April and 17th of September, 1870, in the repairing and rendering safe and secure the meadows along the river Delaware."

The work was alleged in the claim to have been done under an act of March 25, 1848 (P. L. 250), and an ordinance of July 1, 1863 (Ord. 203).

Plaintiffs read the claim in evidence and closed. Defendant then offered to prove:

1. That the value of the work done was less than the sum charged.
2. That the work was so insecurely done, that it has had to be done over again annually ever since.
3. That most of the work for which this claim was filed was rebuilding, and that the wall was not on the line of the old wall.
4. That the work for which this claim was filed was an absolute injury to defendant's land.

All of these offers were excluded, under the provision of the act that the "defendant shall only be permitted to aver and prove in defence that the lien in whole or in part has been paid since the same was filed."

Verdict for plaintiffs for \$6445.16, subject to the question reserved as to the constitutionality of the act of 1848.

Opinion delivered *January 3, 1874*, by

MITCHELL, J.—It is quite clear that this act if taken literally as to its prohibition of all matters of defence upon the trial, other than *payment after the filing of the claim*, is contrary to the provisions of the bill of rights.

It is certainly not remedy by due course of law when defendant's property is charged for certain work, and all inquiry is closed as to just and substantial defences, and nothing left to him to say but that he has paid the bill, though the price may be excessive, the work badly done, or even not done at all.

It is true that provisions in regard to municipal claims that the defendant shall only be permitted to deny that the work was done, or prove that the price was greater than the value, or that the claim has been paid or released, have been sustained, yet in none of these acts that have been brought to our attention, has there been such a peremptory prohibition of all the elements of defence as in this present act, and wherever substantial defences have been shown, though not within the permission of the statutes, the courts have unhesitatingly allowed their introduction. Thus a defendant may set up that the city exceeded its authority, by paying more than the distance allowed at one time. *Kensington vs.*

Keith, 2 Barr, 218; or that the contractor was not selected by a majority of the owners. *City of Philadelphia vs. Reilly*, 10 Sm. 467; or that the defendant is charged for a larger front than his lot really contains. *Thomas vs. N. Liberties*, 1 H. 117; or that defendant is not the owner of the lot charged, the same having been dedicated to public use. *Board of Health vs. Gloria Dei*, 11 H. 259.

If the prohibition of other defences than payment were the only objection to this act, it might well be that it would be unconstitutional only *pro tanto*, and valid for all other purposes; but after much consideration, we are of opinion that it is void as a whole, because it amounts to a taking of defendant's property, not by the judgment of his peers or the law of the land, and is therefore repugnant to section 9 of the bill of rights.

The phrase "law of the land," (or "due course," or "process of law," which mean substantially the same thing—*Cooley Constl. Lim.* 353), says Coulter, J., *Brown vs. Hummell*, 6 Barr, 91, means "the law of the individual case, as established in a fair and open trial, or an opportunity given for one in court, and by due course or process of law." So Thompson, J., in *Fetter vs. Will*, 10 Wr. 461, says, it "means judgment of law in its regular course of administration through courts of justice." And the same definition is given by Agnew, J., in *Craig vs. Kline*, 15 Sm. 413.

It must be admitted that these definitions do not apply literally, so as to require a trial by the ordinary judicial tribunals in cases coming under the regulation of the police power of the Commonwealth, and it was strongly argued by the counsel for plaintiff in this case that the act is valid as an exercise of the police power. Much reliance upon this part of the argument was placed on *Kennedy vs. Board of Health*, 2 Barr, 366. In that case the board of health filed a claim against defendant's lot for the expense of removing a nuisance therefrom, and it was held that on the trial the defendant could not dispute the fact that a nuisance had existed. It is somewhat remarkable that no constitutional question was raised in that case, but the views of the court are clearly indicated when, to the argument of counsel for plaintiff in error, that there was "not a shadow of evidence that there was any nuisance," Sergeant, J., replied: "The Legislature have given the board of health final judicial power on that subject." This is the key-note of the decision. The State, in the exercise of its police power, may pass by the ordinary judicial tribunals, but it cannot, even in this class of cases, take a citizen's property without an *adjudication* of some tribunal authorized by law, upon the facts of the case which justify the taking. The ground upon which all summary remedies, out of the usual course of law, have been sustained is, that they afford an equivalent by the judgment of a special tribunal, and I have not been able to find any case in which an act of assembly has been sustained which provided for the taking of private property outside of the ordinary course of the law, without such equivalent adjudication. *Kennedy vs. Board of Health*, 2 Barr, 366; *City vs. Houseman*, 2 Phila. 349; *Craig vs. Kline*, 15 Sm. 413; *Easby vs. Philadelphia*, 17 Sm. 337.

Tried by this standard, the act of 1848 is found wanting. It provides, that "It shall be the duty of the commissioners, . . . upon com-

plaint by any person owning property on said river . . . that said banks, or any part of them, are out of repair . . . to give notice forthwith to the owner . . . to repair the same within forty-eight hours . . . and in case such owner shall neglect or refuse to cause such repairs to be made . . . it shall be the duty of such commissioners to cause the said banks to be well and thoroughly repaired," etc.

Not only is there here no provision for a hearing of the party to be charged, but none even for an investigation and judgment by any tribunal at all. The complaint of any neighboring owner makes it at once incumbent on the commissioners to notify the owner to repair, and if he neglects or refuses, then it is imperative on them not to examine and determine whether repairs are necessary, but to "cause the said banks to be well and thoroughly repaired." Such a regulation subjects the property of one citizen to be charged by the private act of another, without investigation or determination by any public officer or tribunal, even *quasi* judicial. Such regulation is in violation of the letter as well as the spirit of the bill of rights.

We are also of opinion that the act is objectionable as a taking of private property for a private use. The Legislature in the exercise of its police power for public purposes, such as the preservation of navigation, or of the public health, or other similar use, may undoubtedly charge riparian owners with the burden of maintaining walls or banks, and in so doing the Legislature itself may make the adjudication of the necessity of the work to be done. It is sufficient to say that no such public purpose appears in this enactment. It is an act applicable only to a small locality, and so far as can be gathered from its text and its provisions, intended to accomplish only a local and private purpose. For such purpose, though not in terms prohibited in the Constitution, it is now settled law that the Legislature cannot, either with or without compensation, take or charge private property. *Palairer's Appeal*, 17 Sm. 486.

Judgment for defendant on the point reserved.

David W. Sellers, Esq., for plaintiff.

Oscar Meyers, Esq., for defendant.

[Leg. Int., Vol. 31, p. 20.]

DANIEL WILLIAMS AND GEORGE C. WILLIAMS, EXECUTORS OF
ANTHONY WILLIAMS, DECEASED, vs. DE HAVEN & BROTHER.

One co-executor cannot release a debtor, for a deposit made in the names of both executors.

A motion for judgment for want of a sufficient affidavit of defence. Opinion delivered January 10, 1874, by

HARE, P. J.—The question presented in this case is, so far as I am aware, one of the first impression. It is, whether one co-executor can, without the knowledge and assent of the other, release a demand arising from a deposit made in the names of both, and agree to look solely to the fund in the hands of the assignee, to whom the debtor has transferred his property for the benefit of his creditors.

The inclination of the court in the first instance was in favor of the validity of the defence, but an attentive examination of the authorities

has led to an opposite result. It is well settled in general, that the acts of one co-executor bind all the others, by reason of the confidence reposed in them individually, in consequence of which each has full power over the assets. *Beltzhoever vs. Darragh*, 16 S. & R. 327, 329. This is an exception to the rule that when a trust or authority is delegated for mere private purposes, the concurrence of all who are intrusted with the power is requisite to its due execution (*Sinclair vs. Jackson*, 8 Cowen, 533, 583), and distinguishes executors from trustees, who are regarded by equity as forming one collective trustee, and must, therefore, execute the duties of the office in their joint capacity. *Vandever's Appeal*, 8 W. & S. 405, 409. Hence a payment to one executor, or a release from him, extinguishes the debt, although he misapplies the money, and no part of it comes to the use of the estate. *Herbert vs. Pigott*, 2 C. & M. 384. For a like reason, one may, where the circumstances require it, take part and release the residue, or accept goods or securities in satisfaction (*Smith vs. Everett*, 27 Beavan, 446; *Gilman vs. Healy*, 55 Maine, 120); and it will make no difference if the case be free from fraud, that the compromise is effected without the knowledge of the co-executor, or that it is against his wishes. *Murray vs. Blatchford*, 1 Wend. 583; *Herbert vs. Pigott*, 2 C. & M. 183. It results from this principle that one of several co-executors is not answerable for the acts or defaults of his companions, unless he was negligent, or had notice of some fact or circumstance rendering it a duty to interfere. *Townley vs. Sherborne*, 1 Bridgman, 39.

It is at the same time equally well established, that the executors may join in the administration of the assets; and such is often the better course, as affording an additional guarantee to the creditors and legatees. Under these circumstances each is responsible for the safe-keeping of the fund, and cannot allege the neglect or misconduct of another, as an excuse for a loss which would not have occurred if he had been diligent. *Mendes vs. Guedalla*, 2 J. & H. 259. Ordinarily, an executor is not liable for non-feasance, but if he enters on the execution of any part of the trust he cannot stop short, and must do all that is requisite to conduct the business to a successful termination. An executor who unites in the collection of a debt, cannot get rid of his responsibility by leaving the proceeds in the custody of his associate, and should, on the contrary, take such measures as will prevent the fund from being used without his knowledge. The place of safe-keeping must consequently be one where both can exercise a control or supervision. The authorities accordingly agree that money which has been received by a co-executor should be deposited to their joint account, and if this precaution is not observed, and a loss ensues through the fraud of him who is intrusted with the fund, a chancellor will visit the consequences on both. See *Clough vs. Bond*, 3 Mylne & Craig, 490; *Langford vs. Gascoyne*, 11 Vesey, 333. Under these circumstances they are still executors, but executors charged with a fiduciary obligation which renders them virtually trustees as it regards the assets which they have received and hold in common.

The existence of such an obligation implies the power to fulfil it. *Lex neminem cogit ad vana seu impossibilia*. It were futile to open a joint account if one of the depositors could withdraw the money. All

must, therefore, unite in the receipt or check in order to discharge the banker, and it follows that he cannot rely on a compromise or release by one as a defence. This is not so much an exception to the rule, that a payment to a co-executor discharges the debt, as a return to the general rule, to which that is an exception. The right of each executor to act without the concurrence of the rest seems to have been the growth of circumstances. A testator might have assets in different counties, and lying as far apart as Canterbury and York. It might be difficult or impracticable to find any one who was able and willing to assume the whole responsibility, and he might appoint a representative in either province, in the expectation that each would collect what lay nearest to his own door. So one executor may be chosen for his knowledge of accounts, and another for his skill and sagacity in the adjustment of outstanding and disputed claims. Under these circumstances, it would be useless and injurious to require that all should join in the acts that can be better performed by one. The privilege is not confined to executors, but extends measurably to trustees, who, as Lord Keeper Coventry observed, in *Townley vs. Sherborne*, may permit one of their number to receive all or the most part of the profits without a breach of trust, "it falling out many times that some of the trustees live far from the lands, and are put in the trust out of other respects than to be troubled with the receipt of the profits." In this case, as in that of executors, the right to receive necessarily implies the power to give an acquittance.

It results from what has been said that the right of executors to sever in the execution of the trust is a concession to expediency, which should not be made when the case is one for care and judgment, and it is possible for all to unite without inconvenience. It does not, therefore, exist, where a fund arising from the collection or sale of the assets comes to the hands of two or more executors or administrators, or has been deposited to their joint account. Under these circumstances, there is nothing to exclude the principle that persons acting in a fiduciary capacity must concur in every measure affecting the interests which they represent. See *Beltzhoever vs. Darragh*, 16 S. & R. 829, 839; *Mendes vs. Guedalla*, 2 J. & H. 259.

The rule for judgment is made absolute.

J. W. Hunsicker, Esq., for plaintiff.

Samuel Dickson, Esq., for defendant.

[Leg. Int., Vol. 31, p. 60.]

CADWALLADER vs. APP.

An expression of intention, by one in possession of real estate, "to claim the property, as he did not believe the plaintiff had any title," is a sufficient commencement of adverse possession; and the time of this expression is a question for the jury: "Whether a plaintiff had made a re-entry for condition broken, in accordance with the stipulations of the deed, is a question for the jury."

Ejectment. Motion for rule for new trial. Opinion delivered *February 14, 1874*, by

THAYER, J.—The defendant and his father before him had been in possession of the land for forty-three years—that is, from 1829 to the commencement of this action in 1872. But at the end of the first ten

years, that is, in 1839, the possession, so far as it could be considered an adverse possession, was interrupted and ended by a written agreement made between George App (the defendant's father and grantor), and the plaintiff, by which George App agreed to purchase the lot from the plaintiff on a ground-rent, and by the actual payment of rent under the written agreement. These payments ended on the 4th of September, 1850, when the last payment was made, and George App demanded a deed. The plaintiff, not complying with his request, although several times repeated, George App refused to pay any more rent, remained in possession and conveyed the property to his son, the defendant, who had occupied the premises for a long time previously, and has been in possession ever since.

The written agreement of sale signed by the parties being sufficient to take the case out of the statute of frauds, and being followed by the possession of George App under it, the plaintiff could have no right to the possession so long as it remained in force, but only to the rent. If it was rescinded, then the plaintiff may demand the possession, unless an adverse possession has been acquired in the interval which has elapsed between the rescission and the commencement of this suit. It is quite plain that after the rescission of the contract it was competent for George App and his son to acquire a title by adverse possession. That such an adverse possession had existed did not admit of doubt under the evidence. The material question was, *when* it had commenced, and whether it had existed for twenty-one years before the commencement of this suit. George App had sent a letter to the plaintiff, on the 24th of April, 1851, denying his title in formal terms. This action of ejectment was commenced on the 22d of April, 1872. If, therefore, the letter was the beginning of the adverse possession, it is clear that the adverse possession lacked at least one, and perhaps two days of the twenty-one years required by the statute to make it a good title; one day if the adverse possession began on the 24th of April, two days if it commenced on the day after. But there was evidence in the case which would have rendered it improper for the judge who tried the case to give a positive instruction to the jury that the adverse possession had not commenced before the date of the formal letter denying the plaintiff's title which George App had sent to the plaintiff. George App had stopped paying rent on the 4th of September, 1850. Mr. Foley, the plaintiff's agent and clerk, testified that when the last payment was made App had demanded his deed; that he had subsequently demanded it again; that after the last payment of the rent, Samuel App told him that "he intended to claim the property because he did not believe that the plaintiff had any title." He asked if the plaintiff was prepared to give the deed, to which Mr. Foley replied, No. Samuel App then said, "I want you to understand that my father will pay no more rent." These are expressions which indicate plainly enough the commencement of a hostile possession. The precise time at which they were used was not stated by the witness. It was only relatively fixed by reference to the last payment of rent on the 4th of September, 1850. Samuel App had for many years occupied the building which his father, George App, had erected upon the premises, as a watchmaker. Under this state of the evidence it must be obvious that the court could not do otherwise than

to leave it to the jury to say, whether the conversation referred to occurred before the letter was sent to the plaintiff or afterwards. If before, it was evidence from which the jury might properly find that the adverse possession had commenced before the date of that letter. The jury found the question of adverse possession in favor of the defendant. It was a fact for their determination, was fairly left to them, and we see no reason to disturb their verdict on that account.

The property in dispute belonged originally to Mary Penn, the wife of Richard Penn. By an indenture dated July 1, 1784, Richard and Mary Penn had leased the premises for ten thousand years to one Scipio Wormley, at an annual rent of \$13.33. The plaintiff had acquired a title to this rent charge and to the reversion of the land, from the Penns. Before he could show any title to the possession of the land it was necessary that he should prove that the particular estate granted to Scipio Wormley had been destroyed. He accordingly produced evidence to show that the estate of the lessee had been forfeited by a re-entry for non-payment of the rent. To this it was replied by the defendant that the re-entry was void, because, by the terms of the lease, the right of re-entry was reserved only upon condition that no sufficient distress could be found upon the premises to pay the rent in arrear, and he alleged and adduced evidence to prove that there was a sufficient distress upon the premises when the re-entry was made. The court left it to the jury upon the evidence, to say whether there was or was not. And we are of opinion that it was rightly left to the jury to determine the validity of the re-entry thus brought into question by the allegations and proofs of the defendant. The plaintiff was obliged to make out his own title before he could disturb the defendant in his possession. If no valid re-entry had been made the lease for ten thousand years was outstanding, and the plaintiff had no right to the possession and no standing in court. He had a right to forfeit the term by a re-entry. Whether he had done so in accordance with law and the stipulations of the deed, was necessarily left to the determination of the jury.

The other reasons for a new trial are not sustained. The plaintiff's fourth point was affirmed, and not refused, as erroneously stated in the reasons, and the lease of the adjoining premises which the plaintiff offered in evidence was clearly irrelevant to the issue.

Rule refused.

George T. Bispham and William H. Rawle, Esqs., for plaintiff.

J. D. Bennett, Esq., for defendant.

[Leg. Int., Vol. 31, p. 76.]

RIEGLER vs. CUNNINGHAM.

It is no defence to an accommodation note that it came into plaintiff's hands after maturity, if it came to him from one who acquired it for value before maturity.

Rule for judgment for want of a sufficient affidavit of defence. Opinion delivered *March 3, 1874*, by

MITCHELL, J.—The affidavit sets forth that "the defendant never received any consideration for the indorsement of the said note, and that plaintiff came into possession of the said note after it was overdue and protested." If the defendant had gone a step further, and set out that the

note came to plaintiff's hands *from the payee* after maturity, or that it had not before maturity been in the hands of any holder for value, then undoubtedly the affidavit would have been good. Had this omission to state facts necessary to a complete defence been unintentional, the defendant could have had another opportunity by a supplemental affidavit, but his counsel very frankly admitted at the argument that the money had been loaned to the maker, Brenneman, by one Frick, upon the credit of defendant's indorsement. The case was therefore a loan of defendant's credit, coming squarely within the ruling of *Appleton vs. Donaldson*, 3 Barr, 382; *Lord vs. Ocean Bank*, 8 H. 384; and *Moore vs. Baird*, 6 C. 138. The note, therefore, being perfectly good in the hands of Frick, the fact that he passed it to plaintiff after maturity is utterly immaterial.

Rule absolute.

Isaac Gerhart, Esq., for plaintiff.

Joseph Jackson, Esq., for defendant.

[Leg. Int., Vol. 31, p. 76.]

WALSH *vs.* KENEDY.

1. Where a man in his last illness and about to make his will, signed a promissory note payable to a third person, and left it in the hands of his executor, under circumstances which gave rise to a strong presumption that he intended it as a gift: *Held*, that an action could not be maintained upon it without proof of a valuable consideration.
2. *Query*. Whether, with proof of a valuable consideration, an action could be maintained upon it, it never having been delivered to the payee, either by the decedent or his executor.

Motion for rule to take off nonsuit. Opinion delivered *January 24, 1874*, by

THAYER, J.—The declaration was upon a promissory note for \$5000, made by James E. McCulla, the defendant's testator, and payable to the plaintiff's order; to which was added the common count for services. The only witness examined by the plaintiff was the defendant Kenedy, executor of McCulla. At the trial he produced from his possession, upon the plaintiff's call, a promissory note for \$5000, signed by McCulla and payable to the plaintiff's order. Being examined, he testified that the note was signed by McCulla during his last illness; that he, Kenedy, had never delivered it to the plaintiff, but that after the death of McCulla he had put a stamp upon the note and retained it in his own possession ever since. He declared, however, that he would have paid the note if the family of the deceased had not immediately objected to his doing so. Being questioned as to the purpose for which the note was signed, he said that the decedent told him that "*he wanted to give Dan \$5000*," that he then went on to talk about his will, that he assigned as a reason for not putting the \$5000 to Walsh in his will the dissatisfaction of his family; that if they fought the note he could not help it.

Kenedy further testified, that the plaintiff Walsh was in the employ of McCulla, and had charge of his business; that he received a salary of \$125 per month, which was overdrawn at the time of McCulla's death; that nothing was due to the plaintiff on account of salary, or on any other account, that he knew of; that some time after the decedent

had signed the note, he, Kenedy, asked him if he did not intend to allow anything to Feeny, who was also in his employ, to which the decedent had responded, that Feeny did not deserve anything; that, notwithstanding this, he had given Feeny also a note for \$2000; that plaintiff, after McCulla's death, had made no claim for anything due to him, but on the contrary, had settled with the witness at the rate of \$125 per month, and had borrowed from the witness a sum sufficient to refund to the estate the amount which he had overdrawn; that the profits of the business under the plaintiff's management were very large, amounting to as much as \$23,000 during the nine months preceding McCulla's death.

Upon this testimony the plaintiff was nonsuited.

Passing by the difficulty which stands upon the threshold of the plaintiff's case, that this note was never delivered to him either by McCulla or his executor, it is quite plain that the circumstances under which it was made, coupled with the total absence of proof of any valuable consideration for it, must be fatal to the plaintiff's recovery. The evidence shows, beyond a reasonable doubt, that it was intended as a gratuity, and that the sick man, then not far from the goal of his earthly journey, and not wishing to do what he knew would not be agreeable to his family, declined to put the gift as a legacy in his will, but was induced by some cause to sign the note, leaving the plaintiff to take his chances upon it with the law, if the family should object—a contingency which he plainly foresaw when he declared that "if they fought it he could not help it." Why should he expect his family to contest the payment of a just debt? The executor, who, to say the least, seems to have interposed no cautionary counsel against these gifts in anticipation of impending dissolution, subsequently suggested Feeny also as a proper recipient of the sick man's bounty, and McCulla, although he replied at first that Feeny did not deserve anything, was actually induced by some cause to sign a note for Feeny, also for the sum of \$2000.

Transactions such as these are to be very closely scrutinized when they come into courts of justice. And the welfare of society demands that they who make them the foundation of legal claims shall show with reasonable certainty that they rest upon the solid foundation of legal obligation arising from valuable consideration. In the present case there was no proof that such was the case, but the whole evidence went to show that the object to be accomplished by McCulla was to give the plaintiff \$5000 without putting it in his will.

Looking upon the promissory note then in the most favorable light in which the plaintiff's evidence exhibited it on the trial, it can be regarded only as a voluntary instrument for which no consideration had been given, and which was intended to operate, if it should operate at all, as a gift. But considering it as a gift, either as a gift *inter vivos*, or as a *donatio mortis causa*, it is too plain for argument that it cannot be made the foundation of an action.

There was no evidence to support the other count, and the plaintiff's offer fell short of an offer of proof which could have made out his case, and was therefore properly rejected.

Rule refused.

J. G. Johnson, Esq., for plaintiff.

Barger & Gross for defendants.

[Leg. Int., Vol. 31, p. 52.]

THE CITY OF PHILADELPHIA *vs.* FELL.

1. A city ordinance authorized the paving of Beckett street from Woodland street to Forty-third street, and the city made a contract with the plaintiffs, for paving the street between those two points. The plaintiffs were prevented from paving the whole distance by an act of assembly, which prohibited the opening of streets through Hamilton park. The work was done by the plaintiffs under the supervision of the commissioner of highways, and was approved by him: *Held*, that the plaintiffs having paved the street as far as they were permitted by law to pave, were entitled to recover from the property-owner, for the portion of the work with which he was chargeable.
2. A selection of the paver made by the property-owners is not vitiated by the fact that it was made before the passage of the ordinance authorizing the paving if it was allowed to remain in full force, unrevoked and unobjected to, and the work was allowed to proceed without objection.
3. Other points relative to contracts for paving public streets.

Rule for a new trial and motion for judgment on reserved points.
Opinion delivered *January 24, 1874*, by

THAYER, J.—By an ordinance of the city councils approved April 13, 1869, the department of highways was authorized and directed “to enter into a contract with a competent paver or pavers, who shall be selected by a majority of the owners of property fronting on Beckett street from Woodland street to Forty-third street, for the paving thereof, the conditions of which contract shall be, that the contractor or contractors shall collect the cost of said paving from the property-owners respectively, and shall also enter into an obligation with the city, to keep the said street in good condition for three years after the paving is finished.” On the 24th of June, the city, by the chief commissioner of highways, entered into a written contract with Cunningham and McNichol, the plaintiffs, to pave Beckett street from Forty-third street to Woodland street.

On the trial, it appeared that the plaintiffs had paved Beckett street, from Woodland street to a point 405 feet west of Forty-second street. It also appeared that the remaining distance between this point and Forty-third street, was a part of the property of the Hamilton Park Association, a corporation incorporated by an act, approved March 17, 1864 (P. L. 1864, p. 192), and that it had not been paved in consequence of an act of assembly, approved July 18, 1863 (P. L. 1864, Appendix p. 1113), which enacted, that no street should be opened or continued across or within the limits of said tract of land, during the period in which it should be held and used as a park without the consent of the owners thereof.

The defendant insisted that inasmuch as the ordinance of councils had only authorized the highway department to enter into a contract for the paving of the *whole* distance between Woodland street and Forty-third street, and inasmuch as the contractors had by the contract made with the city expressly undertaken to pave Beckett street the whole distance from Woodland street to Forty-third street, and in point of fact had paved only a part of the distance contracted for, they could not recover. This was the principal question of law in the case, and on the trial it was reserved. The commissioner of highways testified on the trial, that he had supervised the paving during its progress, that he had inspected it when finished, that it was done in accordance with law and met his approval. It was quite plain upon the evidence, that the city officials approved of the prosecution of the work as far as

the point to which it was actually completed, and that there was an impossibility of prosecuting it beyond that point, in consequence of the prohibition of the statute, a circumstance which seems to have been overlooked, at the time of the passage of the ordinance.

Are the contractors, who appear to have acted in good faith, to go unpaid for the work actually done, because they did not perform that part of the contract, which the law prevented them from performing, and in the non-performance of which the city, by the executive agents to whom the supervision of the matter was confided, acquiesced? If the city councils, through ignorance of the restraining statute, authorized a contract too large in its terms, and thereby induced Cunningham and McNichol, through the same ignorance, to enter into it, and if Cunningham and McNichol performed the contract as far as it was lawful to perform it, are they now to be told that they have no right to be paid for the part which they performed, because the law prevented the performance of the residue? To affirm this would seem to affirm a manifest injustice. True, the ordinance required the whole distance to be paved, and the ordinance was the foundation of the agreement, the law of the contract, but it is a case in which *impotentia excusat legem*. If H. covenants to do a thing which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed. 1 Salk. 198; *Lord Anglesea vs. Churchwardens of Rugley*, 6 Q. B. 107, 114. But is the whole covenant repealed when it is capable of division, and one party performs it as far as it can legally be performed, and with the knowledge and approbation of the other party? We think not. In such a case the party cannot lawfully be deprived of his compensation for the part lawfully performed.

But it is said that the only authority which the highway department had over the subject, was to procure the paving of Beckett street throughout the whole distance from Woodland street to Forty-third street, and that if the street could not be lawfully paved for the whole distance mentioned in the ordinance, the highway department had no authority to accept of less, or to authorize the paving as far it could be lawfully done. Corporate agents, and especially the agents of municipal corporations, are to be confined doubtless within the literal boundaries of the authority delegated to them. In general, this rule is to be rigidly enforced. It is one of the necessary defences against dishonesty, and a profligate administration of municipal affairs. And I may add, it is a rule which this court has always been strenuous to maintain, and which it would not willingly relax. It has no application, however, to the circumstances of this case, for here has been no unwarrantable departure from the letter of the authority. The city councils authorized their agents to have a work performed, which up to a certain point was altogether lawful, and beyond which the performance was prohibited by law. Was not this a good authority to the agent to have the work performed as far as it was lawful? Especially as the ordinance remained unrepealed, and stands to this day the evidence of a sufficient authority for everything which could be lawfully done under it. It is to be observed also, that the highway department, in the form of the contract, followed in good faith the very letter of the ordinance, and thereby fell into the same error which the councils themselves had committed: for the agree-

ment which they prepared for the contractors, and which they required them to sign, bound them to pave the whole distance from Woodland street to Forty-third street. We can come to no other conclusion upon the evidence, than that the parties to the contract acted in good faith. It seems to be highly probable that they were ignorant of the existence of the act of July 18, 1863, which was a private act, and might therefore well be unknown to the parties, and which prohibited the opening of streets through the Hamilton park grounds. And we are of opinion that the plaintiffs ought not to be prejudiced by this, but that inasmuch as they have performed the contract as far as it could be lawfully performed, the first point must be resolved in their favor.

Several minor objections were urged by the defendant. The first was, that the terms of the ordinance which require the pavers to be selected by a majority of the owners of property fronting on Beckett street from Woodland street to Forty-third street, were not complied with. It cannot be denied that the paper dated March 27, 1870, agreeing that the paving should be done by the plaintiffs, was signed by a majority of the property-holders on Beckett street between Woodland street and Forty-third street. It is true, that in the paper referred to, they describe themselves as the owners of property on Beckett street, between Woodland street and a point 405 feet west of Forty-second street, but it was in evidence that the ground throughout the whole remaining distance, that is, from the point indicated to Forty-third street, all belonged to one person, viz.: the corporation known as the Hamilton Park Association, and counting in the association as an owner, it is quite clear that the signers of the paper were a majority of owners between Forty-second and Forty-third street. This was one of the facts in issue and was found by the jury in favor of the plaintiffs, and found upon sufficient evidence.

It was also objected that the paper signed by the majority of the owners was dated before the passage of the ordinance. We do not think this a tenable objection. It would be putting a very rigid construction upon the requirements of the ordinance, to hold that a selection made immediately before the passage of the ordinance, and in anticipation of it, is void under its provisions, and is to prevent a recovery by the party who has done the work upon the faith of it, especially in view of the fact that the majority allowed their selection to remain in full force, making no other selection, and permitting the work to proceed in accordance with the selection so made, when they might have revoked it at any time before the awarding of the contract. *Dickerson vs. Peters*, 21 P. F. Smith, 53.

It was further objected, that at the time when the ordinance authorizing the paving of Beckett street was passed (April 13, 1869), and when the selection of the pavers was made by the majority of property-owners, an ordinance then in force (that of June 12, 1868) required all streets which might be paved in West Philadelphia (where this paving was done) "to be laid with rubble pavement, or material to be approved by the chief commissioner of highways, which shall be of stone irregular in shape, with depth from six to nine inches, and length five to twelve inches," whereas this paving had been done with cobble stones. But the ordinance of June 12, 1868, was repealed so far as it related to Beckett street, by another ordinance passed June 21, 1869, which was before the execution of the contract between the plaintiffs and the city—the con-

tract being dated June 24, 1869. Now the ordinance authorizing the paving did not require any particular kind of pavement to be laid. Under it the commissioner was authorized to contract for any kind of pavement which might be in accordance with the city ordinances upon the subject, and at the time he made the contract for the city with the plaintiffs the cobble stone pavement was in accordance with the existing ordinances upon the subject. This is a sufficient answer to the objection that the kind of pavement required by law was changed subsequent to the passage of the ordinance authorizing the paving to be done. So far as the objection rests upon the fact that the kind of paving authorized by the city ordinance was changed by another ordinance passed subsequent to the selection of the pavers by the majority of the property-owners, it is disposed of by the considerations already referred to. The selection made by the owners was allowed to remain in full force and unrevoked, notwithstanding the commissioner had been released by the ordinance of June 21, 1869, from the restrictions contained in the ordinance of June 12, 1868. It is argued that the property-owners might have selected other pavers if they had foreseen that cobble pavement was to be used instead of rubble pavement. If so, then why did they not revoke their selection and make a new one before the city commissioner made the contract? They had plenty of time in which to do so, but they allowed their selection to stand, and there is no evidence whatever that they have ever objected to it, or have ever desired to be released from it, or have ever desired to depart from it or annul it, or that they now object to it. The objection now made is not made by the majority of the property-owners, but by the defendant alone, and there is no reason to believe that they approve or adopt his objection. The instrument which is the evidence of the selection made by the majority of the property-owners, if it indicates anything with respect to the kind of pavement to be used, plainly indicates that the cobble pavement was to be used, for the *price* fixed is the price for laying the cobble pavement, which, as is well known, is cheaper than the rubble pavement, and that is the price at which the city contracted with the plaintiffs, and for which the plaintiffs have obtained a verdict. It would seem that the property-owners had anticipated the repeal of the ordinance of June 12, 1868, confining the commissioner to rubble pavement, otherwise they would not have fixed upon the price of cobble pavement. The ordinance was repealed on the 21st of June, 1869, and the commissioner made the city contract with the plaintiffs on the 24th of June, 1869.

Finally, it is further objected by the defendant that there was no evidence that the contract had been approved by the city solicitor, or that the plaintiffs had advertised their proposals. There was no evidence on either side upon the subject. In the absence of evidence to the contrary the public officers are presumed to have done their duty in these respects; and *stabit præsumptio donec probetur in contrarium*. We are relieved therefore from considering the question, whether a non-compliance with these directions of the city ordinances would have imperilled the plaintiff's contract.

Rule discharged and judgment for the plaintiffs on the points reserved.

William H. Lex and *H. M. Dechert, Esqs.*, for plaintiff.

Victor Guillou and *Samuel Dickson, Esqs.*, contra.

[Leg. Int., Vol. 31, p. 98.]

CONIER *vs.* WHITNEY *et al.*

1. The city has the right by ordinance to direct the seizing and sale of estray horses.
2. A sale on the day of its advertisement is not sufficient notice to the owner.

Rule for a new trial. Opinion delivered *March 21, 1874*, by

BRIGGS, J.—The plaintiff's horse being found in a public street of this city, was captured by one of the mayor's policemen, under the provisions of an ordinance passed *March 1, 1855*, requiring police officers to take up any horse found at large in the highways of the city. The ordinance also requires that such horse be sold after notice of time and place of sale has been given in two daily newspapers of the city, unless the owner of the horse redeem him before sale and pay the expenses incurred.

The horse was captured in the evening of the 4th or 5th of May, and sold on the 14th of the same month at 10 o'clock in the morning, that being the time fixed for the sale in the notice given on the day of sale by the advertisement in the "*Public Record*" and "*Philadelphia Inquirer*" (daily papers of the city). The defendants purchased the horse at this sale. The plaintiff replevied him.

At the trial the defendants claimed title to the horse by virtue of the ordinance and their purchase under it. To this the plaintiff replied, that the ordinance was unconstitutional in this, that it took the plaintiff's property without due process of law or adjudication by an authorized tribunal, and in any event the notice by advertisement on the day of sale was not such reasonable notice as was contemplated by the ordinance.

We are of opinion that the councils of the city did not transcend their powers when they passed the ordinance. The charter of the city confers upon the councils the power to establish by ordinance police regulations.

The necessity of such an ordinance as this is so manifest as to be self-convincing, as the want of power to capture stray horses in the streets would place the life of the citizen at the caprice of ungovernable and vicious animals. The bare statement of such a result carries with it the presumption that the Legislature meant to give the city authorities unfettered jurisdiction in the premises.

But by the terms of the ordinance a notice by advertisement is required before sale. This means reasonable notice. In this case the only notice given was by advertisement on the day of sale, notwithstanding the horse had been captured for ten days.

In the absence of actual notice to the owner we do not think the notice by advertisement on the day of sale was such notice as was contemplated by the ordinance, and hence upon this ground a new trial is ordered.

Rule absolute.

John Samuel, Esq., for plaintiff.

Messrs. Read and Pettit, for defendants.

[Leg. Int., Vol. 31, p. 98.]

ROHRMAN vs. STEESE.

If an owner interferes with a contractor, and subjects him to his command, the contractor is not liable for injuries to his work occasioned thereby.

Rule for a new trial. Opinion delivered March 21, 1874, by

BRIGGS, J.—The defendant put an additional story on his house, and employed the plaintiff to put the tin on the roof. The plaintiff accordingly put the tin upon the roof at the defendant's direction before the brick walls had been run up. He did this upon a notice from the defendant that unless he proceeded with the work the next day the defendant would employ another person to tin the roof. After the roof was tinned, and before it was painted, the bricklayers ran up the wall, and in doing so dropped bricks upon the tin, cutting it in several places so badly that it leaked, and greatly damaged the interior of the house. After the brick-work was finished the tinner painted the roof and delivered it to the defendant as completed, first soldering up the holes which had been cut by the bricks being dropped upon the tin. The plaintiff filed his lien for the tin and tin-work, and issued a *scire facias* thereupon to recover therefor. At the trial the defendant's counsel took the position that the damage to the building from the leakage in consequence of the tin being cut should be deducted from the plaintiff's claim, and now upon this rule for a new trial, he presses with great force, that the plaintiff, and not the defendant, was liable for the mishaps to the roof until it was completed by being painted and delivered to the defendant.

This, as a general proposition, is undoubtedly correct, and would be unanswerable had this building been erected as buildings generally are, with the walls up before the roof is put on. Considering, however, that the tin was put on at this exceptional time, at the command of the defendant, under circumstances of extra hazard, from the accidents injuring the roof, we do not think that the plaintiff's duty should be measured by the rule contended for so earnestly by the defendant's counsel. The plaintiff's case is rather an exception to the rule, and hence should not be judged by it. The defendant's command gave the plaintiff no alternative but to proceed with the work at once or to abandon it. Surely the plaintiff should not be answerable for accidents to the roof, when the work was done not by the contractor at his own time and pleasure in the performance of his contract, but at the special command of the defendant.

We do not understand the rule to be that an owner is exonerated from liability even where there is a contract, when he interferes with the contractor, and subjects him to his command. In such case the contractor, instead of remaining master of the contract, is subordinated to and becomes the servant of the owner; and this shifts the liability upon the owner, which otherwise would remain with the contractor.

Rule discharged.

Joseph Savidge and John S. Powell, Esqs., for plaintiff.

William J. McElroy and George W. Wollaston, Esqs., for defendant.

[Leg. Int., Vol. 31, p. 108.]

MARTIN vs. DEARIE *et al.*

The court, on application of plaintiff, may order defendant to file the depositions taken on his behalf, on payment by plaintiff of the costs for taking the depositions.

A rule on defendants to file depositions. Opinion delivered March 28, 1874, by

BRIGGS, J.—The defendant took the deposition of a witness and declined to file it. Hence this rule on them to do so.

In *Gordon vs. Little*, 8 S. & R. 533, the court said: "When the deposition is taken it ought to be filed. It is not the property of the party on whose behalf it was taken; nor has he any right to withhold it." In *Nussear vs. Arnold*, 13 S. & R. 323: "The depositions belong to neither party, but are for the use of both, and should be delivered to the prothonotary with all convenient speed as soon as they have been taken." And in *Bennett vs. Williams*, 7 P. F. Smith, 404: "All depositions of witnesses, under a rule of court, to be used in evidence in the trial of a cause, like depositions taken under a commission, must be filed with the prothonotary."

While the direct point whether depositions taken under a rule of court by one party for his own use can be required by the other party to be filed for the common use of both parties, did not arise in any of the foregoing cases, yet the language of the court is so comprehensive that we have no doubt it would so rule if such point should come directly before it for adjudication.

The rules of this court permit, but do not require a party to file such depositions. Nor is it the practice of the bar of this city to file depositions before they have been used at the trial. It rather regards them as the property of the party for whose use they are taken, and who has been at the trouble and expense of procuring them. This practice is well sustained by the reasoning of Mr. Justice Gibson in *Gordon vs. Little* (already cited), 8 S. & R. 555. He says: "until the deposition is actually admitted, I cannot see upon what ground it is to be considered as the common property of both parties. It is a measure of precaution taken by the one, at his own trouble and expense, and is adverse to the other, who certainly has no right to participate in the benefit. He could have examined the witness for himself, and might just as well claim a continuance on account of the absence of a witness on the adverse part, because he depended on his adversary to procure his attendance. He has no right to calculate the chances of the latter taking a particular course; and if he does so, it ought to be at his own risk. Beside the abstract injustice of the thing, substantial injury would be done by permitting a deposition to be introduced against the consent of him who had it taken. Before the magistrate, the witness is considered and treated as the *witness of the party who examines him*; and at the trial he is necessarily the *witness of the party who reads his deposition*. The case then would present the strange spectacle of a party offering his own witness, with the benefit of a cross-examination, which is *denied* to the party against whom he is offered. The latter may have declined the use of the deposition, because, not having been allowed to put leading questions, he was unable to bring out the only fact for

which the testimony of the witness was desirable. This is not all; he has conducted the examination with a view only to particular facts, in the course of which, other facts which he is not apprised of as being considered important by the other side, are spoken of in a way that he afterwards finds prejudicial to him.

Now as to these he is led into a surprise which he could have avoided if his attention had been led to them by a direct examination from the other side. . . . Where, therefore, the party desiring to avail himself of this sort of evidence, *might* have had it taken in a way more conducive to fairness as respects his adversary, the court ought to require a better excuse for the omission, than attention to his own convenience."

Notwithstanding the powerful argument of Mr. Justice Gibson to the contrary, it seems from the *dicta* of the cases herein cited, either party may have the depositions filed. I use the word "*dicta*," because, in none of those cases was the question directly raised, which is raised by this rule. In *Gordon vs. Little*, the point was, whether a deposition taken by the plaintiff, could be read at the trial by the defendant under a rule of court, providing that the deposition of a witness who resides within forty miles of the court cannot be read in evidence, unless the witness be sick or unable to attend. The witness resided in the country and had not been subpoenaed. In *Nussear vs. Arnold*, a commission had been returned and *filed*, but taken from the prothonotary's office by the defendant's counsel pursuant to a custom among the members of the bar. The deposition was admitted under objection; and this was the alleged error. In *Bennett vs. Williams* the rule of court required the deposition of a witness taken under a rule of court to be filed with the prothonotary. The deposition had not been filed. At the trial a motion was made for an order on the plaintiff to produce the deposition of the defendant. This motion was refused, and this was held to be error.

Of course, where the rule of court requires the depositions to be filed with the prothonotary, that must be done. They would be of no effect without compliance with the rule. Nor can it be doubted that the court may order a deposition filed, taken under a rule which does not require it to be filed; the court having control of the rule may control the proceedings under it, but in doing so should always take care, in ordering more to be done after the deposition is taken, than was required by the general terms of the rule under which it was taken, that the party put under orders sustain no surprise, and that no undue advantage be given to his adversary.

Concluding then, that either party may move for an order to have a deposition, to be used at the trial, filed, the manner of protection against the surprise so forcibly depicted by Mr. Justice Gibson is, when it is discovered that the witness is adverse to the party calling him to treat him accordingly, and subject him to a rigid cross-examination by leading and direct questions upon all material points, so that if the adverse party should use the deposition he would take it with as little damage to the other party as possible.

In view of the practice prevailing here, and no rule of court requiring a deposition thus taken to be filed, we will not decide that depositions so taken shall be filed of course, but recognizing the power of the court

to order it to be placed on file when required by the other party, we make this order in this case: That the defendants file the deposition with the prothonotary, the plaintiff first paying the defendants the sum of money they paid for having the depositions taken.

John H. Sloan, Esq., for plaintiff.

M. Abbott and David Webster, Esqs., for defendants.

[Leg. Int., Vol. 31, p. 98.]

SHEETZ *et al.* vs. HANBEST.

The act of 1869 disqualifies a party as a witness when the other party is dead, although he would not have been disqualified prior to that act.

Rule to take off nonsuit. Opinion delivered *March 21, 1874*, by

BRIGGS, J.—The plaintiffs are creditors of John D. Lentz, and are claiming the fund in court as against the defendant's executors, the holders of Lentz's judgment note to Hanbest for \$10,000. The plaintiffs allege *inter alia*, that this note was obtained by Hanbest from Lentz by fraud. An issue having been found to determine that question, the plaintiffs at the trial called Lentz as a witness. The defendants objected to his competency upon the ground that he was rendered incompetent by the act of April 15, 1869, and Hanbest's death. This objection was sustained, and the plaintiffs having no further testimony, a judgment of nonsuit was entered.

Whether this was right is now the question and upon this question (Judge Lynd being absent from sickness) the court stand divided, two members being of the opinion that Lentz was not affected by the act of 1869, inasmuch as he would have been a competent witness had that act not been passed; under the doctrine of the cases of *Galway's Appeal*, 10 C. 242; *Smith's Executors vs. Wagenseller*, 9 H. 491; *Ferree vs. Thompson*, 2 P. F. S 353; while the two remaining members of the court are of the opinion that the act of 1869 not only enabled Hanbest to testify, if living, but upon his death, it disabled Lentz, the surviving party to the note, from testifying. His incompetency is not put upon the ground of interest, but of policy; it being impolitic to permit one party to a contract to give his version when the lips of the other party are sealed in death. In construing the act of 1869, in *Karns vs. Tanner*, 16 P. F. Smith, 305, the present chief justice uses this expressive language: "Where one of two parties to a transaction is dead, the survivor and the party representing the deceased party stand on an unequal footing as to knowledge of the transaction occurring in the lifetime of the deceased. The enacting clause had opened the lips of all the parties, but when death came it closed the lips of one, and even-handed justice required the mouths of both to be sealed."

As bearing upon this view the cases of *Graves vs. Griffen*, 7 H. 176; *Alum's Executors vs. Carroll's Administrators*, 17 P. F. Smith, 68; *Watts vs. Leidig*, 29 Leg. Intel. 1872, p. 293, are also in point.

A bill of exceptions being sealed, without doing more than to state the views of the respective divisions of the court, the case is respectfully submitted to the umpirage of the Supreme Court.

Rule discharged.

HARE, P. J., and MITCHELL, J., dissenting.

The act of 1869 is entirely an enabling act. The proviso excepts from the operation of the act certain cases, as to which the law remains as it was before the passage of the statute. It is conceded that the witness would have been competent at common law: *Ferree vs. Thompson*, 2 P. F. S. 353; and we are of opinion that nothing in the act disqualifies him. There is no decision of the Supreme Court reported in which any witness has been held incompetent who would have been competent before the act of 1869.

Aaron Thompson, Esq., for plaintiff.

Hon. F. Carroll Brewster, for defendant.

[Leg. Int., Vol. 31, p. 132.]

FENTON *vs.* THE WILSON SEWING MACHINE COMPANY.

1. An action for a malicious prosecution will lie against a corporation aggregate.
2. To maintain such an action it is not necessary to show an express authority from the corporation to its agents to institute the prosecution and carry it on. It is sufficient if the evidence shows that the prosecution was commenced and carried on by agents of the corporation, in its interest and for its benefit, and that they acted within the scope of the authority conferred upon them by the corporation.

Rule for a new trial. Opinion delivered April 18, 1874, by

THAYER, J.—The question raised in this case is one which does not appear to have been hitherto decided in this State. It is, whether an action for a malicious prosecution will lie against a corporation. Now the essence of every such action is proof of malice, and it is said to be both unphilosophical and impossible that a corporation can be actuated by malice; that being, as Lord Coke said, in the celebrated case of *Sutton's Hospital*, “only in *abstracto*, and resting only in intendment and consideration of law,” it can have neither passions nor motives, neither affections nor hatred, and so cannot by any means set on foot a malicious prosecution; that it can have no malice, because it has no soul, that it can no more be guilty of a malicious prosecution than it can of treason, and can no more be punished for malice than it can be excommunicated for heresy, which Lord Coke, in the same case, assures us to be altogether impossible. By a like course of reasoning, it was said, in former times, that being invisible and without body or natural organs, it could perform no corporal function. Having no voice it could not speak, and so could not make a parol promise. Having no hands it could not either beat or be beaten. For the same reason it could not disseize anybody, nor be seized itself of lands to the use of another, nor do homage; nor could it be executor or administrator, nor perform any personal duty whatever.

The logical formula in which this course of reasoning resulted is expressed by Sir William Blackstone in these words: “A corporation being an invisible body cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks *only* by its common seal.” Such views, however well they may have accorded with the metaphysical reasoning of the ancient English lawyers, would seem, even in those days, to have jarred frequently with the actual administration of the law, for there are in the year-books numerous instances of actions of trespass against corporations, notwithstanding the assertion

of the contrary doctrine in some of the old digests, as in 4 Com. Franchise F. 19; Vin. Ab. Cap. K. 22. And they were always held liable in *quare impedit*, where the hindrance is a species of tort. *Butler vs. University of Cambridge*, Barnes, C. P. 350; Winch, 625-700; 3 Levinz, 332. In modern times the whole body of the law upon this subject has undergone an essential alteration, both in its principles and its practice. All the refinements and quaint distinctions which fill the ancient books have been swept away by the progressive changes which have taken place in society, and by that law of development which in every direction characterizes the growth of English jurisprudence, and which constitutes its chief excellence and superiority over all other systems—that law which evolves continually from the necessities of human society the rules which regulate its rights and remedies, and which, springing directly from the customs and habits of the people, are applied by the judicial tribunals without waiting for the tardy relief afforded by legislative interposition. Not only will an assumpsit now lie against a corporation upon the parol promise made by its agent within the scope of his lawful authority, but what was said by Gibson, C. J., in *The Cumberland Valley R. R. vs. Baab*, 9 Watts, 458, may be safely affirmed as a general proposition, viz., that in all cases within the scope of its legitimate functions it may act as a natural person may act. And the rule of corporate responsibility has kept even pace with the growth of their powers and the enlargement of their spheres of action, not only in regard to the enforcement of contracts, but also in making them amenable to personal actions for their torts, and holding them to the same measure of responsibility in those respects to which natural persons are held. Had this not been so their existence would have become an evil too intolerable to be borne. It was well and eloquently said by Mr. Binney, in the *Chestnut Hill and Spring House Turnpike Co. vs. Rutter*, 4 S. & R. 11, when it was argued against him that a corporation could not commit a tort: "If a corporation be the intangible being it is asserted to be, a greater and more mischievous monster cannot be imagined. According to the doctrine contended for, if they do an act within the scope of their corporate powers it is legal and they are not answerable for the consequences. If the act be not within the range of their legitimate powers they had no right by law to do it; it was not one of the objects for which they were incorporated, and therefore it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice." And Chief Justice Tilghman responded from the bench in the same strain: "But it is objected that the present action is not on contract, but on tort, and a very refined argument is brought forward to prove that a corporation cannot be guilty of a tort. A corporation, say the defendant's counsel, is a mere creature of law, and can act only as authorized by its charter. But the charter does not authorize it to do wrong, and therefore it can do no wrong. The argument is fallacious in its principles and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies, for a company may do great injury by means of laborers, who have no property to answer the damages recovered against them. There is no solid ground for a distinction between contracts and torts. For it may be shown that from the earliest times to the present, corporations have been held liable for torts."

Whatever doubts or obscurity may have once existed upon the subject, it cannot now be denied, that it is the settled law, both in England and in the United States, that corporations are responsible in the same manner, and to the same extent, that natural persons are responsible, for wrongs and injuries committed upon the rights of property, whether real or personal, and that they are amenable in general to the same remedies and forms of action which protect property against the wrongful encroachments of individuals.

In *Yarborough vs. The Bank of England*, 16 East, 6, it was held, that trover would lie against them, and that to make them responsible, it is sufficient that the conversion was the act of their servants within the scope of their authority. "A corporation," said Lord Ellenborough, "can do no act, not even affix their common seal to a deed, but through the instrumentality and agency of others. They cannot, as a corporation, be subject to a *capias* or exigent, because the remedies which attach upon living persons cannot be applied to bodies merely politic and of an impersonal nature. But whenever they can competently do or order any act to be done on their behalf, which as by their common seal they may do, they are liable to the consequences of such act, if it be of a tortious nature and to the prejudice of others." The principles of this decision were recognized in *Maund vs. The Monmouthshire Canal Co.*, 4 Man. & Gr. 452, which was trespass *qu. cl. fregit* and *de bonis asp.*, and they have ruled all the subsequent cases in England and the United States, and were fully adopted in Pennsylvania in *Turnpike Co. vs. Rutter*, 4 S. & R. 6, and *McCready vs. The Guardians of the Poor*, 9 S. & R. 94, which cases settled the law in this State beyond all dispute, that trespass *vi et armis*, and trover, will lie against a corporation. "I do not say," said Duncan, J., in the latter case, "that a corporation would be responsible in trespass for every outrage committed by their servants or agents. The act must appear to be done by their authority, not express, but implied from its own nature, in the prosecution of some corporate claim, in the exercise of some corporate right, and in such case, where the act done would be within the scope of corporate claims, it would not be necessary to show the authority or mandate under the corporate seal." Since the case of *Yarborough vs. The Bank of England*, the rule may be regarded as settled in the English law, that corporations are liable in trespass, trover and case, wherever, under similar circumstances, natural persons would be liable. This case first broke down the fancied immunity which was supposed to result from the abstract nature of their existence, and all the subsequent decisions are but necessary deductions from the principles there laid down. Nobody now doubts that a corporation may be a disseizor, and thereby acquire a freehold; although the contrary is laid down in 2 Bac. Ab. 689, Disseizin, B., or that replevin can be maintained against it, though Mr. Kyd, relying upon the old abridgments, asserts the contrary, p. 223, assigning as a reason, that it can only distrain by a bailiff, which leads to the absurd position that one may command and abet a trespass and reap the fruits of it, and then escape, by a fiction which transfers the whole responsibility to a hired and irresponsible agent.

But although it can no longer be denied that an action will lie against a corporation for every species of tort to property, whether real or personal, in the same manner, and under the same circumstances in which it

will lie against natural persons, many have questioned whether an action will lie against them for offences against the rights of persons, as for an assault, a libel, a malicious prosecution, etc. Sir Wm. Blackstone, upon the faith of Bro. Ab. tit. Corporation, 63, declares, that "a corporation can neither maintain nor be made defendant to an action of battery, or such like personal injuries, for a corporation can neither beat, nor be beaten in its body politic." 1 Bl. Com. [477.] But this conceit, like the others which claimed immunity for corporations beyond that which belongs to individuals, is rapidly vanishing before the doctrine of equal rights, and the policy which assimilates corporations in all their rights and responsibilities to natural persons. It would have been strange, indeed, if the same law which fastens upon them a just responsibility for injuries committed by their agents upon the rights of property, should have failed to protect in an equal degree from their encroachments the rights of persons. A corporation cannot commit a battery, but it can procure one to be committed by its agents. It cannot publish a libel, but it can procure one to be published, and it may by the same means procure a false arrest and carry on a malicious prosecution, and where they give authority and employ their means for such purposes, they ought to be compelled to give the same redress, which is exacted from private persons. The rights of persons are not inferior in dignity or importance to the rights of property, and the protection of the public requires that the former should be equally defended with the latter against the aggression and injury of corporate agents, wielding the authority, influence and resources of their invisible principals. Without this responsibility for the invasion of personal rights, corporations, notwithstanding the protection which exists against their encroachments by irresponsible agents upon the rights of property, would still remain the "mischievous monsters," which Mr. Binney declared the argument of his adversaries made them.

The most authoritative decisions of modern tribunals declare that this responsibility ought to be and is imposed upon them by law. In the *Eastern Counties Railway vs. Broom*, 6 Exchequer, 314, 2 Law & Eq. 406, S. C., it was decided, after solemn argument, that an action of trespass for assault and false imprisonment will lie against a corporation for the act of its servant in the exercise of the authority committed to him by his general instructions. "Whatever," said Patteson, J., "was the law as laid down in the year books and elsewhere, it has, undoubtedly, in modern times, been held, that trespass would lie against a corporation. There is no doubt a corporation cannot beat or be beaten, but it cannot be said that if they authorize any one to do so, they are not liable for the act. We are clearly of opinion that an action for assault and battery will lie against a corporation whenever the corporation can authorize the act to be done and it is done by their authority." The same point was decided in the Queen's Bench in the subsequent case of *Goff vs. The Great Northern Railway Co.*, 30 Law Jour., N. S., Com. Law, 148, where it was again ruled, that "a corporation is liable in an action for false imprisonment if the act be committed by the authority of the company. And the authority need not be under seal, but it lies on the plaintiff to give evidence justifying the jury in finding that the company's servants who imprisoned him had authority from the company to do so." In the case of *Whitfield et al. vs. The S. E. Railway Co.*, 1 El. Bl. & El. 115,

a corporation was held responsible for the publication of a libel under circumstances which implied malice in law sufficient to support the action. In *Green vs. The London General Omnibus Company*, 7 C. B. N. S. 290 (97 Eng. C. L.), a corporation was held liable for intentional acts of misfeasance by its servants in the course of their employment, the acts being charged to have been maliciously and vexatiously done, and being injurious to the plaintiffs. "The doctrine," said Earl, C. J., "that a corporation, having no soul, cannot be actuated by a malicious intention, is more quaint than substantial. Extreme mischief and inconvenience would follow from our holding that these companies, incorporated for the purpose of carrying on trade, are exempt from liability for intentional acts of wrong. We think it extremely important that those whom they have injured should not be driven to seek a doubtful remedy against their officers or servants who may be wholly unable to answer the compensation which the jury may award to the injured party."

And they are held to be indictable also for their wrongful and unlawful acts—for acts of misfeasance as well as nonfeasance, notwithstanding the opinion to the contrary expressed by Lord Holt in 1 Mod. R. 559. *The Queen vs. The Great North of England Railway Co.*, 9 Q. B. 316, (58 Eng. C. L.) Said Lord Denman: "The argument is that for a wrongful act a corporation is not answerable to an indictment, though for a wrongful omission it undoubtedly is. No assumption can be more unfounded. Why should a corporation be liable for the one species of offences and not for the other? The startling incongruity of allowing the exemption is another argument against it. The law is often entangled in technical embarrassments, but there is none here." And *Regina vs. Scott*, 3 Adol. & El. 543, is to the same purpose. The cases already cited, and others which might be referred to, fully warrant the remark made by the learned editor of the Common Law Reports, Mr. Henry Wharton, that "the old doctrine, that a corporation aggregate is not capable of malice, may therefore be considered as abandoned in England."

The American Courts have, with few exceptions, adopted the doctrine of these cases. In the case of *Goodspeed vs. The East Haddam Bank*, 22 Conn. 530, the very point under discussion in the present case was decided, and it was held, that an action for a malicious and vexatious suit will lie against a corporation. "These institutions," said Church, C. J., "have been so multiplied and extended within a few years that they are connected with and in a great degree influence all the business transactions of the country, and give tone and character to some extent to society itself. We do not complain of this, but we say, that as new relations from the same cause are formed, and new interests created, legal principles, of a practical rather than of a technical or theoretical character, must be applied. The claim is, that as a corporation is ideal only, it cannot act from malice, and therefore cannot commence and prosecute a malicious suit. This syllogism of reasoning might have been very satisfactory to the schoolmen of former days, more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them transacting and effecting thereby results of the greatest impor-

tance every day. And if they can have any motives they can have a bad one. They can intend to do evil as well as to do good. The interests of the community and the policy of the law demand that corporations should be divested of every feature of a fictitious character, which shall exempt them from the ordinary liability of natural persons for acts and injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed by others, and they are entitled to an equal protection for all their rights and privileges and no more." These are sensible observations, and worth more to us of the present time than all the musty and obsolete pedantry which is frequently wasted upon this subject.

In *Moore vs. Fitchburg Railroad*, 4 Gray, 465, the Supreme Court of Massachusetts held, that a corporation may be sued for an assault and battery committed by their servant acting under their authority.

In *Philadelphia, Wilmington and Baltimore Railroad Co. vs. Quigley*, 21 Howard, 202, it was decided by the Supreme Court of the United States, that an action will lie against a corporation for the publication of a libel.

In *Trenton Mutual Life Ins. Co. vs. Perrine*, 3 Zabriskie, 402, the converse of the proposition was sustained by the Supreme Court of New Jersey; and it was held that a corporation aggregate may maintain an action for a libel published of them concerning their trade and business, and by which they suffered special damage. "The result of the cases is," said Campbell, J., delivering the judgment of the court in *Phila., Wil. & Balt. Railroad Co. vs. Quigley*, "that for acts done by the agents of a corporation, either *in contractu* or *ex delicto*, in the course of its business and their employment, the corporation is responsible as an individual is responsible."

In the *First Baptist Church vs. The Schenectady & Troy Railroad*, 5 Barbour, 79, a corporation was held responsible in an action for a private and personal nuisance caused by the ringing of bells and blowing off steam. In *Watson vs. Bennett*, 12 Barbour, 196, it was held that a corporation aggregate is responsible for the torts of its officers or agents done in the performance of their ordinary duties, or by special directions of the corporation.

In *Merrills v. The Munf. Co.*, 10 Conn. 384, vindictive damages were allowed against a corporation for the commission of tortious and fraudulent acts.

I have met with only two American cases which refuse to recognize and adopt these salutary and just principles: *Orr vs. Bank of United States*, 1 Ohio, 36, decided in 1821, and *Childs vs. The Bank*, 17 Missouri, 213, decided in 1852. In the first case, it was held that a corporation cannot be sued for an assault and battery. In the second, that it is not liable to an action for a malicious prosecution. In *Foots vs. Cincinnati*, 9 Ohio, 31, it was also held, that trespass *qu. cl. freg.* will not lie against a corporation, a doctrine which, as we have seen, was distinctly repudiated in Pennsylvania, by *Turnpike Co. vs. Rutter*, and *McCreedy vs. The Guardians of the Poor*. The cases in Missouri and Ohio may be accounted for by the fact that the more recent cases which I have already cited were not then extant, and the judges preferred to stumble along in the old ruts, rather than to strike out into new paths.

however obvious and safe they might be. Judges, as a general rule, like to travel in company, and they distrust a path which is not well beaten by previous footsteps. The *nulla vestigia prorsum* often arrests their footsteps, although the way may be lighted by reason and guarded by justice. In these cases, the reasons assigned for the judgments are the old ones, so familiar to the law student. A corporation has no hands to commit an assault and battery. It has no soul to be put into motion by malice. It has no body, and cannot therefore beat or be beaten. They cannot commit a trespass. They cannot be arrested nor outlawed. Assumpsit, it is true, may be maintained against them, but because the law has been changed in relation to contracts, it does not follow that it is also changed in relation to torts. We must be excused, if we decline, upon the authority of these cases, to return to the old abstractions, and to bury ourselves in the mists with which the ancient lawyers surrounded the *ens legis*, when the way has been made so clear before us. We prefer to stand upon the rule of reason and public policy and equal justice—the rule that corporations can claim no exemption from responsibility for the wrongs which they commit, either by any fiction of law, or by any ingenious application of the ancient metaphysics. They are to be held responsible for injuries done by their servants in the same manner and to the same extent only as a natural person would be under like circumstances. They are not liable for the unauthorized trespasses of their agents. They are only liable when those acts are done *communicato consilio*, that is, when they have been directed, suffered, or ratified by the corporation. Within the limits of this rule, the safety of private rights demands that they shall be held to a rigid accountability.

In the case in which we are now to enter judgment, the plaintiff's case was fairly and satisfactorily made out. He was employed by the defendants to sell and hire out their machines. He was charged as bailee with the larceny of seven of these machines. He was arrested on the 1st of January, 1873, and locked up all night. On the next day he was taken to the central station, and detained until two o'clock, when he procured bail. It was severe weather, and he suffered greatly in the cell from the cold, which subsequently brought on rheumatism, and his health was seriously impaired for several months. The charge was grossly false, and upon a hearing on habeas corpus he was immediately discharged. The prosecution was set on foot by one Raynor, who was the manager of the company, and swore that he had the entire control of the company's business in this city and district. That he had employed counsel to conduct the prosecution for the company, and had conferred with him upon the subject. Another agent for the company made the affidavit upon which the warrant for the plaintiff's arrest issued. A third agent appeared as a witness against him. Counsel appeared at the hearing on behalf of the company to conduct the prosecution. The company was informed of these proceedings after they had been commenced, but took no steps to stop them. It further appeared that the company is an Ohio corporation, whose affairs are managed entirely by agents. The company has no board of directors. It was also shown that when the plaintiff was discharged upon habeas corpus, nothing appearing against him, the district attorney asked why he had been arrested,

whereupon Raynor, the company's manager, or Floyd, the company's counsel, replied, that he had been arrested in order to compel him to settle with the company.

This brief statement of the facts which appeared in evidence will suffice to show that the jury was fully warranted in finding as they did, that this prosecution was originated and carried on by the company, and from corrupt and malicious motives. They must, therefore, bear the brunt of the blow which they aimed at another, but which has recoiled upon themselves.

Rule discharged.

Edward H. Weil, Esq., for plaintiff.

Hon. Benjamin Harris Brewster, for the defendant.

[Leg. Int., Vol. 31, p. 156.]

DINGEE vs. BECKER.

1. Proving a debt in bankruptcy does not of itself operate as an absolute extinguishment or satisfaction of the debt. If the bankrupt's discharge is refused, the creditor who has proved his debt is remitted to his former rights and remedies.
2. But a creditor who has proved his debt is barred during the pendency of the proceedings in bankruptcy from pursuing the bankrupt in any other forum. If there is unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, the remedy of the creditor who has proved his debt is to speed the determination of the question of the bankrupt's discharge. If the bankrupt neglects to apply for his discharge, or to prosecute his application with reasonable diligence, the creditor who has proved his debt must obtain leave of the court of bankruptcy to prosecute his claim by due course of law, or move to dismiss the application for discharge. Without this he cannot proceed to collect his debt in another court until the bankrupt's discharge is refused.
3. A creditor who has not proved his debt nor made himself a party to the proceedings in bankruptcy is not precluded from proceeding to collect his claim by an action at law, if the bankrupt has been guilty of unreasonable delay in endeavoring to obtain his discharge. Such a creditor is not to be sent to the bankruptcy court for relief, but the question of unreasonable delay is to be determined by the court in which the action is pending.

Rule to set aside the *fi. fa.* Opinion delivered May 9, 1874, by

THAYER, J.—The plaintiff obtained a judgment against the defendant in the year 1862. The defendant was adjudged a bankrupt on September 3, 1869. The plaintiff proved his debt in bankruptcy. The defendant has never obtained any discharge and there seems to have been unreasonable delay on his part in endeavoring to obtain it. Under these circumstances the plaintiff issued the present execution, and the defendant has moved to set it aside. Upon the argument it was strenuously maintained by the defendant's counsel, that the plaintiff having proved his debt in bankruptcy, is forever precluded by section 21 of the bankrupt act from pursuing the defendant at law. Proof of the debt, it was argued, operates under the statute as a complete satisfaction and discharge of the debt, whether the bankrupt be discharged or not. The section referred to enacts that "No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby; and no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment

any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined, and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, *provided* there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge; and *provided* also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid."

If this section of the act stood alone it would be difficult to avoid the conclusion insisted upon by the defendant, viz., that the creditors who prove their debts are thereby absolutely and forever precluded from making any further claim upon the bankrupt for the same cause, and from maintaining any suit at law against him for it, or issuing any execution against him to collect it. And that result would follow without regard to the issue of the proceedings in bankruptcy. Whether the defendant obtained his discharge or not the claim of the proving creditor would be absolutely extinguished, and he could, under no circumstances, demand anything but his dividend out of the bankrupt's estate.

But in interpreting a statute we are to examine the whole of it in order to determine its meaning and effect, and not a particular part of it. We are to collect its meaning, not from one section, but from the whole instrument—*ex antecedentibus et consequentibus*. Every part of it is to be brought into action in order to collect from the whole one uniform and consistent sense.

Applying this fundamental rule of interpretation to the bankrupt law, it is quite impossible to give to the 21st section the unqualified effect which the defendant's counsel attributes to it. By the 29th section, which regulates the bankrupt's discharge, notice is required to be given of the bankrupt's application for a discharge to all creditors who have proved their debts. They are to be required to appear on a day appointed for the purpose and show cause why a discharge should not be granted to the bankrupt. If they can show that the bankrupt has been guilty of either of the disqualifying acts therein mentioned, his discharge is to be refused. By the 31st section such creditors may have an issue awarded to try the facts upon which their opposition to the discharge is based. By the 34th section creditors who have proved their debts, or whose debts were provable, may contest the validity of a discharge which has been already granted, on the ground that it was fraudulently obtained, and if, upon the hearing, the fraud is found, "judgment shall be given in favor of said creditors, and the discharge of the bankrupt shall be set aside and annulled." Now for what purpose are creditors who have proved their debts to be notified of the bankrupt's application for a discharge, and given an opportunity to oppose it, if their claims upon the bankrupt are not to be affected by his discharge? if their claims are barred by having proved their debts, whether the bankrupt be discharged or not, of what avail is it to oppose his discharge? And why are they permitted to apply to the court to annul a discharge obtained by fraud, if they are not to be affected by the result? And what kind of a judgment is that which is to be given

"in favor of such creditors," if it be a judgment which leaves their claims satisfied and extinguished, while it annuls the discharge?

Such an interpretation of the act is altogether inconsistent with its provisions. That which extinguishes the bankrupt's debts, whether they be proved or only provable, is his discharge. His release is entirely dependent upon that. This results not only from a comparison of the various provisions of the act, but is the necessary conclusion from the language of that portion of it which declares the effect of the proceedings in bankruptcy upon the bankrupt's debts. "A *discharge* duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities and demands, which were, or might have been, proved against his estate in bankruptcy." Sec. 34. It is the *discharge* which he is to plead: *Ib.* And it is the certificate of discharge which is to be "conclusive evidence in favor of such bankrupt:" *Ib.* The whole scheme of the law and its several provisions examined in detail show conclusively that if the bankrupt's application for a discharge is refused, all the creditors, as well those who have proved their debts as those who have not, are remitted to their former rights and remedies.

What then is the meaning of the strong language used in the 21st section of the act, relative to creditors who have proved their debts? Taking the whole act together and collecting its meaning, from all its parts, the only construction which will reconcile the several parts, and which will bring the whole into unity and conformity is, that creditors who have proved their claims are temporarily barred during the pendency of the proceedings in bankruptcy from pursuing their claims against the bankrupt in any other forum. We do not now consider the creditor's rights in regard to the enforcement of specific liens, but so far as concerns their personal claims against the bankrupt they are conditionally discharged and surrendered. By submitting themselves to the jurisdiction and becoming parties to the proceedings, they have precluded themselves from proceeding against the bankrupt in any other manner without the leave of the court which has acquired jurisdiction of their claims. They must await the result of the bankrupt's application for his discharge. If it is refused they are then free to pursue their claims by other means and in other tribunals. If the bankrupt unreasonably delays his application for a discharge, or is guilty of laches in his efforts to bring it to a conclusion, the creditor who has proved his debt is still incapable of proceeding elsewhere without the permission of the court of bankruptcy. In such a case he must speed the proceedings in bankruptcy himself, and obtain a decision of the bankrupt's application, or if the bankrupt refuses to make it, or is negligent in prosecuting it, the proving creditor must obtain leave of that court to proceed to collect his debt by due course of law. Until the question of the bankrupt's discharge is determined, he cannot, without the permission of the court of bankruptcy, seek redress in another jurisdiction.

If he has obtained a judgment against the bankrupt, it is, so far as the other creditors are concerned, discharged and surrendered, and he can come in on the bankrupt's estate only *pro rata* with them. But so far as the bankrupt himself is concerned, it remains in abeyance to await the result of his application for a discharge.

On the other hand, the creditor who has not proved his debt has no status in the court of bankruptcy. He has never submitted himself to its jurisdiction, and his right to proceed is no further affected than it is affected by the restraining words of the statute. But this restraint is, by the very terms of the statute, subject to a condition, and that condition is, that the restraint shall not exist if the bankrupt does not use reasonable diligence to obtain his discharge. "No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined, and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, *provided* there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge:" Sec. 21. But the suit can only be stayed by the court in which it is pending, and only upon the condition that there has been no unreasonable delay on the part of the bankrupt. In the case, therefore, of a creditor who has not proved his debt, there is no reason for sending him into the court of bankruptcy to apply for permission to proceed. If there has been unreasonable delay, the proceedings in bankruptcy do not arrest his suit, and he has a right to proceed which he has not surrendered by any act of his, and which the law has not taken away from him. Indeed, it is very doubtful whether he could be heard at all in the court of bankruptcy upon any such application until he had proved his debt. In such a case, therefore, the question of unreasonable delay must necessarily be a question to be determined by the court in which the creditor's action is pending, the court which is called upon to stay the suit.

In the present case the plaintiff, having made himself a party to the proceedings in bankruptcy by proving his debt there, could not lawfully pursue the bankrupt by an execution from this court for the same debt while the defendant's application for a discharge was pending there. If there has been unreasonable delay, his remedy is in the court of bankruptcy, which, by his own act, has acquired complete and exclusive jurisdiction of his rights. He must go there to remove the impediment which he has placed in his own path before he can proceed here.

Rule absolute.

[Leg. Int., Vol. 31, p. 156.]

ALLEN vs. RAFSNYDER.

An agreement among lien creditors in regard to purchase of defendant's property at sheriff's sale, does not discharge defendant's liability to the creditors.

Motion for a new trial Opinion delivered May 8, 1874, by

LYND, J.—Plaintiffs sued on a book account, and obtained judgment December 24, 1870, for want of an affidavit of defence. February 3, 1873, this judgment, upon affidavit filed by defendant, was opened upon the following terms: That the copy of book entries filed by plaintiff should stand as his declaration; that defendant should plead "payment," and should be confined to the matters of defence set forth in his said affidavit.

Among other matters therein set forth was: "Fifth. Since the obtaining of said judgment, namely, in the months of May or June last past, defendant, finding himself unable to pay off the lien creditors on the Eighteenth street houses in full, entered into an agreement with them, including the said plaintiff, wherein it was agreed that the said creditors should buy in said houses at sheriff's sale, pay themselves the amounts actually and justly due to them respectively from the proceeds of a resale, and account to the said defendant for the balance. Said sheriff's sale did take place and the said properties were bought in by Craig Ritchie, Esq., the accredited agent of plaintiffs and of the other lien creditors. Deponent cannot give the exact language of the agreement between him and said creditors, because the only copy of the same is in the possession of the said creditors or their agent; but defendant avers that the purchase of said houses by said lien creditors was in fact a payment of their liens, so that defendant owes nothing to said plaintiffs on said Eighteenth street houses." From evidence offered in support of this alleged defence, and admitted by the court, it appeared that defendant had engaged largely in building operations, including eight valuable houses on Eighteenth street, and, in the spring of 1871, found himself unable to meet his obligations. June 27, 1871, he called together his creditors who held liens for labor and materials furnished to said houses, and proposed to make a voluntary conveyance of six of the same to them in trust, to complete, convey and to sell them, from time to time, and to apply the proceeds to the reimbursement of their outlays, the discharge of the indebtedness due them, and to pay the balance to him. At this meeting, a committee was appointed, who employed Craig Ritchie, Esq., to draft an agreement upon the terms that had been proposed by defendant. A second meeting was then held, at which Mr. Ritchie produced the said draft, defendant being also present. At this meeting searches were produced, from which it appeared that each of the said houses was subject to a large mortgage, that the mechanics' claims were very heavy, and that there were also some general judgments against the defendant.

The character of the discussion at this meeting is not clearly developed, but Mr. Ritchie testifies that he told the creditors that it was impossible to make any agreement with Mr. Rafsnyder; and the important fact that the creditors did not sign the draft of agreement there submitted to them is undeniable. Subsequently, the creditors met at Mr. Ritchie's office and signed an agreement (defendant not being present), by which, after reciting the impendency of a sheriff's sale of the houses aforesaid, the indebtedness to them of defendant for work and materials furnished thereto, the want of probability of their securing said indebtedness, except by becoming the owners of them by purchase at sheriff's sale, and holding the same till they can be advantageously sold, they agreed, each with the other, that said houses should be bought at said sheriff's sale, by Mr. Ritchie, to whom they would furnish *pro rata*, the necessary funds to defray all interest, costs, expenses, taxes, charges, including the amount required to finish said houses and make them salable, and to prevent the same from being sold upon municipal claims or upon the mortgages thereon. It was also provided that the surplus proceeds, if any, after the reimbursement of all expenditures

and charges, and the payment of the claims of them the said creditors, should be paid to —.

(The plaintiff was present at all the meetings above mentioned, and was one of the signers of the said agreement.)

The defendant offered this agreement in evidence, to be followed by evidence that it was understood among the creditors generally, that the agreement was to be treated and considered as if the name of the defendant was written in said blank.

The offer was objected to on the following grounds: First, that it must appear that the *plaintiff* so understood it; and secondly, that, as the defendant was not a party to the agreement, and had furnished no consideration to the parties thereto, the said understanding as to the filling of the — was *ex gratia*, and that defendant had no standing in court to enforce that or any other provision of the said agreement against the parties to it.

Without considering the force of these objections, I was of opinion that, upon the most favorable construction of his affidavit, the defendant was bound to show an agreement in writing, and to which he was a party, and, by the terms of which, the said creditors were to take the said Eighteenth street houses in full, in any event, of their claims upon him on account of said houses. As, upon no reasonable construction, could the said agreement be made to fulfil these conditions, I excluded it.

I was also of the opinion, and this probably weighed more heavily with me, that there was barely a scintilla of evidence to show any consequential relation between the draft of agreement prepared pursuant to the defendant's proposition to his creditors and the agreement afterwards signed by them. On the contrary, it was quite evident that the former had been rejected by them, because it was impracticable for him to make them an available voluntary conveyance; and that the latter had been adopted by them, quite independently of and without any help from him, though doubtless with his entire knowledge. He was powerless to assist or to impede their movements. That they agreed to let him have the surplus, *if any*, may be some evidence of their sympathy for him, and of their indisposition to profit by his misfortunes, but cannot be used to show that they were either fools or knaves. Standing alone, it did not make them trustees *ex contractu*; nor joined with the other evidence in the cause, did it suffice to make them trustees *ex maleficio*. While my brethren are *inclined* to think that the agreement was within the intentment of the fifth item of defendant's affidavit, and therefore in strictness admissible, they are of opinion that, in view of the character of the inquiry which arises upon said agreement, justice could not be adequately administered in an action of *assumpsit*; that, as to that branch of the defence, an action of account render would be the appropriate action at law, and that a still more appropriate action would be by bill in a court of equity, for an account.

We must, therefore, discharge the rule for a new trial.

Inasmuch, however, as the defendant ought not to be precluded from proceeding against the plaintiffs here, as well as his other creditors for the cause of action indicated in the fifth item of his said affidavit, and inasmuch as said plaintiffs, at the trial, voluntarily allowed the said defendant a credit for the sum of \$1830.30, being the net amount

admitted by them to have been realized from the purchase at sheriff's sale, and the resale of the six Eighteenth street houses aforesaid, and the jury allowed said credit in their verdict; therefore, the following order:

Rule for a new trial discharged; plaintiff's judgment is reduced to the sum of \$9326.19 with interest from March 4, 1873 (this being the amount and date of the verdict), without prejudices to the right of the defendant to proceed at law or equity against said plaintiffs, for so much of the debt or damages as he may be entitled to by reason of the matters alleged in the fifth item of his affidavit aforesaid, as may be in excess of the sum of \$1830.30, already allowed to him on said account by the verdict.

[Leg. Int., Vol. 31, p. 164.]

BARRETT vs. BAMBER.

A purchase by the attorney-at-law of the plaintiff in a judgment, of property sold under such judgment, for a price less than its amount, constitutes the attorney the implied trustee of his client.

This state of the record is constructive notice to the attorney's vendee, and fixes him also with the implied trust.

Such a trust is barred by the five years limitation act of 1856.

Rule for a new trial and motion for judgment on point reserved.
Opinion delivered May 16, 1874, by

HARE, P. J.—In the year 1844, a writ of covenant was issued by Mr. Joseph A. Clay, attorney for John Cassin, trustee for the beneficial plaintiff, Lauretta Root. The suit, which was brought to collect \$610, being the arrears of a ground-rent belonging to the trust, went to judgment and execution, and Mr. Clay became the purchaser at sheriff's sale for the sum of \$100. He took this step at Cassin's instance, in order to prevent the ground-rent from merging in the land. In the year 1863, Mr. Clay conveyed the premises to the defendant for \$266, received the price, and paid it over to Cassin. This sale was made in entire good faith so far as Mr. Clay was concerned, but without obtaining the sanction of the Orphans' Court, as the deed of trust required. The jury were instructed that the purchase by Mr. Clay being for a less sum than the amount of the judgment, gave rise to an implied trust for the estate which he represented. They found that the defendant bought without actual notice; but we are of opinion that he had constructive notice arising from the facts disclosed of record. It follows that the plaintiff is entitled to judgment unless the case is within the 6th section of the act of April 22, 1856, which provides, that "no right of entry shall accrue or action be maintained to enforce any implied or resulting trust as to realty," "unless within five years after such equity or trust accrued with the right of entry."

It is very clear that the act did not begin to run while the title remained in Mr. Clay. During the whole of this period the rent was collected by Cassin's agent, and paid over to him; and it is established under the decisions that the statute does not apply as against one who is in the actual or constructive possession of the land. On the defendant's entry in 1863, the situation changed; and he was thenceforth in undisturbed and adverse possession until action brought. If we believe the

verdict, he had no actual notice, and he would consequently be free from liability, but for the implied trust which appeared on the face of his title. If this were all, the statute would confessedly be an answer to the present suit. It was, however, contended during the argument, that an examination of the record would have shown that behind the implied trust lay an express trust, constituted formally by deed. The plaintiff became constructively a trustee for Cassin, and as Cassin was under an express obligation to the plaintiff, the case is not, agreeably to this view, within the beneficial operation of the statute. This argument would be just, were it not that the sale under the paramount judgment passed the estate to Mr. Clay, free from the express trust.

If he had bid the full amount of the judgment, he would have acquired a good title of record. The accident of his giving less than the debt which he had been employed to collect, entitled the equitable plaintiff and her trustee to demand a reconveyance if they thought fit to reimburse the sum actually paid, but this right was one which the act requires to be prosecuted within five years. As between the plaintiff and Cassin, the trust was express; as between Cassin and Mr. Clay, it arose by a legal implication from his duty as an attorney. This implied trust followed the title into the defendant's hands, but he might justly consider the express trust as discharged. If he had dealt with Cassin the case might have been different, but as he bought from Mr. Clay, without actual notice of Cassin's title, he was, at the most, subject to a constructive trust for Cassin. A claim cannot be stronger than its weakest part, and when the link between the defendant and Cassin was broken by the lapse of time, he was no longer bound to the plaintiff. The object of the Legislature was to guard against the uncertainty of parol evidence, by requiring implied and resulting trusts to be prosecuted while the facts are still fresh in the minds of the witnesses. This object must fail if the numerous estates which are settled or devised in trust are exempted from the operation of the statute. The danger incident to the failure of memory, and the removal of testimony by death, is equally great, whether the legal and equitable title are severed or united.

We do not regard the case as affected by the act of March 29, 1865. This repeals so much of the act of 1856 as provides, "that no right of entry shall accrue," etc., so far "as it relates to or protects the title of any attorney-at-law, to any lands purchased or held by him, of or for his client, subject to such trust or trusts." The title here in question is not the title of the attorney, but of a purchaser from him. It is entirely just that an attorney should not be allowed to plead the statute in bar of a trust arising from a breach of professional obligation. Certainly no such plea would have been set up if the property had remained in the hands of Mr. Clay. But it would be difficult to find any valid reason why one who buys from an attorney should be in a worse position than if he obtained the title from any other source.

Judgment for the defendant on the point reserved.

Geo. W. Spiess and E. Coppee Mitchell, Esqs., for plaintiffs.

Geo. Junkin, Esq., for defendant.

[Leg. Int., Vol. 31, p. 184.]

LEECH *vs.* BONSTALL.

An entry of satisfaction of a mortgage by the recorder on a certificate from the District Court that the judgment had been satisfied, does not discharge the lien of the mortgage, where the judgment had not been satisfied by the assignees of record of the mortgagee, but by the plaintiffs in the judgment, who were the original mortgagees. A party who appears from the other testimony to be a party interested in the transaction is not a competent witness where the adverse party is dead.

Motion for a rule for a new trial. Opinion delivered *June 1, 1874*, by BRIGGS, J.—The plaintiff is the executrix of the will of her deceased husband, General Leech.

The action was upon a mortgage executed April 5, 1861, by Joseph H. Bonsall to Jeremiah Bonsall. Bonsall assigned the mortgage to Robert McCurdy for money loaned. This assignment was duly recorded. Robert McCurdy died, and Bonsall paid the money to his executors, and they, thereupon, assigned the mortgage at his request, to General Leech, October 11, 1866. General Leech recorded his assignment on the 1st day of April, 1870. Bonsall, during the year 1870, took this mortgage, as the jury have found, without its being assigned by Leech, and deposited it with Robert S. Paschall, in lieu of a bond and mortgage for \$3000, owned by Mr. Cohu, of New York city, which Bonsall promised to return, but instead of doing so, used them. Paschall, nevertheless, at the request of Jeremiah Bonsall, took from Joseph H. Bonsall, the mortgagor, an amicable *sci. fa.* and confession of judgment thereupon, in favor of "John K. McCurdy, and Robert K. McCurdy, executors of Robert McCurdy, assignees of Jeremiah Bonsall, to the use of Robert S. Paschall." These were filed November 30, 1870, and the judgment immediately satisfied by Paschall without receiving any money, for the purpose of getting the prothonotary's certificate that the judgment was satisfied, and on the faith of such certificate, to get the recorder of deeds to satisfy of record in his office, the mortgage.

Accordingly, in six days thereafter, on the sixth day of December, 1870, a transcript of the record was taken to the recorder, and he made this entry on the margin of the record of the mortgage: "December 6, 1870. By decree of D. C., I declare this mortgage to be fully satisfied of record. John A. Houseman, per M. Meyers."

Thomas S. Bonsall, then having the legal title to the premises, thereafter conveyed them to Charles Ewing, and he on the 17th day of April, 1871, mortgaged a part of the same to the City of Penn Building Association, to secure \$1200. This latter mortgage was duly put in judgment, and the premises sold by the sheriff, by process thereupon, to the mortgagees.

They now claim as *terre tenants*, to defend against the mortgage assigned to General Leech, by virtue of the satisfaction by Paschall of the amicable confession of judgment by Joseph H. Bonsall, and the satisfaction of the mortgage by the entry made upon the record of the mortgage, in the manner before mentioned.

Their counsel contends that, as they are purchasers for value, they should be protected. It must, however, be kept in mind, that before they purchased, and Paschall took the confession of judgment, the assignment of the mortgage to Leech had been recorded; and had they examined the record it would have disclosed to them that Jeremiah Bonsall

had assigned to Robert McCurdy, and his executors to General Leech. The plaintiff's intestate, having done all he could to give notice to subsequent purchasers and mortgagees that he owned the mortgage, is in no default; and conceding that the defendants are purchasers for value, they are not free from the charge of negligence in purchasing without an examination of the record. In answer to this their counsel contends that it is not required of them to examine the record with a view to discover an assignment of mortgage. This is scarcely tenable in view of the act of April 9, 1849, authorizing the recording of such assignments. Why permit the recording of assignments if it affords no protection to assignees?

To hold that they get no protection by recording their assignments, leaves them just where they were before the act was passed—a result surely not contemplated by those who made the law. It is not, however, necessary to argue the question, as it is no longer an open one so far as this court is concerned.

In *Neide vs. Pennypacker* (ante, p. 86), we held, that the recording of an assignment is notice, to another assignee of the same mortgage by the same assignor.

It necessarily follows, that it is also notice to purchasers and mortgagees.

This brings us to consider the effect of the entry by the recorder, upon the margin of the record of the mortgage.

This entry shows that neither General Leech nor any one representing him satisfied the mortgage, and the record of this court shows, that the judgment was not satisfied by decree of this court, as erroneously stated in the recorder's entry of satisfaction; and also this other important fact, that no one representing General Leech was a party to the proceedings in obtaining and satisfying the judgment.

With record notice then, that the title to the mortgage was in General Leech, and nothing to show he had done anything to authorize suit upon it, it follows he is to be protected unless he is concluded by the action of the recorder. The act of April 3, 1860, authorizes the recorder to satisfy a mortgage, upon the prothonotary's certificate, showing that a judgment has been obtained and satisfied of record, either by the receipt of the plaintiff, or by return of execution. It is too plain to need elaboration that the "plaintiff" referred to in the act is the owner of the mortgage, and not a pretender. The satisfaction by the recorder under this act, gives no greater effect to the satisfaction than it is of record in the court, and the prothonotary's certificate merely transfers the evidence of such satisfaction to the recorder; and satisfaction by the very terms of the act can only be effectual where the record of the court shows satisfaction either by the plaintiff's receipt or by return of execution.

Can it be maintained, then, that one without authority, by merely personating a plaintiff, can bind him by his fraudulent act, simply because the prothonotary, without knowledge of the fraud, permits the fraudulent entry to be made? Such is not the act of the prothonotary at all, but of the fraudulent agent or actor.

It is decided in *Lancaster vs. Smith*, 17 P. F. Smith, 427, that such an entry is not the official act of the recorder, and does not discharge the lien of the mortgage.

But it is said there is error in the rejection of Jeremiah Bonsall as a witness for defendants. In determining this, it should be borne in mind, that General Leech was dead; and reading all the offers of the defendants in the light of the testimony of Paschall, their own witness, it is clear that the alleged assignment was for the benefit of Bonsall. Paschall held the mortgage for Bonsall's benefit, and only as collateral to secure Mr. Cohu for the \$3000 bond and mortgage which Bonsall had obtained from Paschall upon a promise to return them, but instead of doing so, he used them.

Paschall testified: "I was then glad to take anything I could get, and took this (plaintiff's mortgage). It was a forlorn hope . . . I brought the suit spoken of at the request of Jeremiah Bonsall. The lot covered by the mortgage was 200 feet by 225 feet, an enormous security, and he, Jeremiah Bonsall, wanted to make use of the land to sell some of it. He agreed to give me other securities for this, if I would satisfy it, but he has not done so to this day."

This shows a direct interest in Bonsall to prove an assignment by General Leech to Paschall, the very fact in question, and thus avoid his liability to both Paschall and Cohu for his improper use of Cohu's \$3000 bond and mortgage. What Paschall did, was for Bonsall—at his request and in his interest. To permit Bonsall to prove that General Leech assigned the mortgage to Paschall, would be to permit the *use* party in the transaction to testify, while the mouth of General Leech, the other party, is closed in death.

This would be in direct conflict with the decision of *Karns vs. Tanner*, 16 P. F. Smith, 297; and *Graves vs. Griffin*, 7 H. 176. Bonsall was, therefore, not a competent witness for the defendants.

Another point remains to be noticed; it is this. After the counsel had finished his address to the jury, he proceeded to read and discuss to them the points he had asked the court to instruct them upon. He was reminded that while he might address the jury upon the points, he could not be permitted to appeal to the jury from the law to be given to them by the court, even in advance of its utterance. This he regards as an abridgment of his rights. My brethren entirely concur with me in the order made in the premises.

How can any other conclusion rationally be reached? Will it, for an instant, be maintained, that counsel, however learned, shall be permitted to appeal to the jury from the law, as given them by the court? To allow such, would constitute the jury a tribunal to review and correct the judge in his decision upon the law. The very proposition is monstrous, and merits instant condemnation.

Discovering no error in the trial, the rule is refused.

Silas W. Pettit, Esq., for plaintiff.

Charles H. Downing, Esq., for defendant.

[Leg. Int., Vol. 31, p. 204.]

ALEXANDER BUCKMAN vs. JOHN WOLBERT, DEFENDANT, AND W. HENRY WILLCOX, EXECUTOR OF ELIZA WOLBERT, DECEASED, GARNISHEE.

A testatrix devised an estate to her executors in trust, to pay the income to her son for life, the same not to be liable for the payment of his debts; and after the son's death, in trust, to transfer the property to his children, with remainder over in case the son should die without leaving issue: *Held*, that the income payable to the son was not liable to execution by his creditors.

Case stated. Opinion delivered *June 20, 1874*, by

THAYER, J.—Eliza Wolbert by her last will, devised and bequeathed all the property and estate of every kind, real, personal and mixed, which she received from her father, to her executors, in fee simple *in trust*, to pay the income thereof to her son, John Wolbert (the defendant in this attachment execution), “for and during the term of his natural life, and that the same shall not in any way be liable for any present or future indebtedness of my said son, and upon his death, in future trust, to transfer and convey the said property and estate to his children then living, absolutely and in fee simple, in equal shares as tenants in common,” with remainders over in case his son should die without leaving issue.

The question is, whether the income in the hands of the executor is bound by the attachment execution against John Wolbert.

This case is not distinguishable in principle from the numerous cases which have settled the doctrine in this State, that a man may, by a properly constructed trust, secure to the object of his bounty the revenue and profits of an estate in such manner that it shall not be liable for the payment of his debts. Such a provision is not contrary to the policy of the law, or to any act of assembly. Creditors cannot complain because they are bound to know the foundation upon which they extend their credit. *Fisher vs. Taylor*, 2 R. 33; *Vaux vs. Parke*, 7 W. & S. 19; *Ashurst vs. Given*, 5 Ib. 323; *Holdship vs. Patterson*, 7 Watts, 547; *Brown vs. Williams*, 12 Casey, 338; *Keyser vs. Mitchell*, 17 Smith, 473. The fact that the bequest was in the form of a trust, for the special purpose of keeping the son's creditors at bay, makes nothing against its validity, for neither public policy nor any principle of equity prohibits a parent from making such a provision for the maintenance and comfort of an insolvent child. On the contrary, these trusts are favored by the law, because they are prompted by the best feelings of our nature, and do no wrong to any man. Here the whole estate is vested in the executors. The son has nothing but a special trust, which gives him no more than the right to enforce in equity the intention of the testator to the extent of his interest. To hold that such a trust can be annihilated by an execution would be to overturn many beneficial settlements of this kind, and to fly in the face of the best considered decisions. The cases of *Park vs. Matthews*, 12 Casey, 28, and *Girard Life Insurance Company vs. Chambers*, 10 Wright, 485, relied on by the plaintiff, are not in point. In neither of the trusts which were the subjects of adjudication in those cases, was there any provision against liability for debts. In the last mentioned case, the court expressed its

great reluctance at being obliged, in consequence of the absence of such a provision, to defeat the testatrix's intention to secure the income to her son. The case of *Keyser's Appeal*, 7 P. F. Smith, 236, was the case of a dry trust, where the whole beneficial estate was vested absolutely in the *cestui que trust*, and was completely under his control, and it was held that the mere interposition of a dry trustee in such a case would not enable a testator to give a beneficial estate in fee simple, with all the usual incidents of ownership, and to except that of liability for debts.

In the present case, the trust is an active trust. The fee simple of the whole estate is in the trustees, in trust to pay the income to John Wolbert for life, without liability for his debts, and after his death to transfer the estate to his children then living, or if he should die without issue, then to the nieces of testatrix, Fanny Boyer and Mary Boyer, for life, or so long as they shall remain unmarried, and after death or marriage, to such persons as would be entitled thereto under the intestate laws, if the testatrix had died intestate. The trustees are therefore clothed with the whole legal estate, for the purpose of preserving these vested and contingent interests. They are to manage the whole estate during the lifetime of John Wolbert. They are to collect and pay him the income during his life, and are responsible to the remainder men for the preservation of the estate which they are ultimately to enjoy. John Wolbert has nothing in the premises but a mere equitable right to receive the income at the hands of the trustees during his lifetime. Such a trust cannot be successfully assailed by creditors. It is impreguably fortified against their attempts by the express provisions of the will, which are in perfect harmony with the law and with the public policy of the State upon this subject.

Judgment for the garnishee.

Theo. F. Jenkins, Esq., for plaintiff.

D. W. Sellers, Esq., for defendant.

[Leg. Int., Vol. 31, p. 204.]

SHUSTER vs. BENNETT.

Where a creditor under a judgment against his debtor has levied upon real estate which is claimed by his wife, or by one who was his wife at the time the property was acquired, and where the creditor in his answer denies the title set up by the wife, he will not be enjoined from proceeding with his execution and selling the property as the husband's property.

Opinion delivered June 20, 1874, by

THAYER, J.—The plaintiff, a married woman, filed her bill in this court, setting forth that she is the absolute owner in fee simple of a lot of ground on the west side of Thirteenth street north of Master street, and that she derived title to the same by deed from one Isaac Bleim and wife, dated August 31, 1866, having purchased the property with her separate money; that she was deserted by her husband before she made the said purchase, and has, since the purchase, obtained a decree of divorce; that the defendant has levied upon the said real estate under an execution upon a judgment obtained against her former husband, and has issued a *venditioni exponas*, upon which he threatens to proceed to sell the said real estate, which is her exclusive property.

She therefore prays for a perpetual injunction restraining the defendant from selling the property in question, and from further interference with her possession and enjoyment of the same.

The answer denies the complainant's title, alleges that the property belonged to her former husband, Jos. C. Shuster, and that the deed to the complainant was made to defraud the husband's creditors.

In *Dyer vs. The People's Bank* (Legal Intelligencer, January 23, 1874), we decided that a creditor who denies in his answer a complainant's title to real estate, and alleges that it belongs to her husband, his debtor, against whom he has obtained judgment, and whose title he is proceeding to sell by execution, will not be enjoined by this court from so doing; that under such circumstances a court of equity ought not to interfere with the creditor in his attempt to test the title in the usual manner by a sheriff's sale and an ejectment. In reaching this conclusion we followed *Winch's Appeal*, 11 P. F. Smith, 424, and pointed out that the doctrine of *Hunter's Appeal*, 4 Wright, 194, had been expressly confined and restricted by *Winch's Appeal*, to cases in which the complainant's title is admitted by the defendant.

The present case is directly within the principle of the decision in *Dyer vs. The People's Bank*. We must, therefore, again affirm, that where the wife's title is denied by the creditor, he is not to be restrained by the summary proceeding of a court of equity, but the true title must be determined in the manner which has been in use in this State from the foundation of the Commonwealth, viz., through the instrumentality of an action at law and the verdict of a jury.

Bill dismissed with costs.

H. T. Fenton, Esq., for plaintiff.

J. D. Yocum, Esq., for defendant.

[Leg. Int., Vol. 31, p. 204.]

CALLICOTT vs. FREEMAN.

A special plea which amounts to *non est factum*, and concludes with a verification, is bad.

Opinion delivered June 20, 1874, by

THAYER, J.—The special plea filed by the defendant sets up facts which show, if they are true, that the mortgage sued upon was not executed or delivered by the defendant—in a word, that it is not his deed. It is therefore a plea of *non est factum*, and ought to have concluded to the country, and not with a verification. This form of pleading was adopted, as was candidly acknowledged on the argument, for the purpose of giving the defendant the affirmative of the issue and the conclusion at the trial. But the plea is bad for the reason stated, and so cannot accomplish the ingenious purpose for which it was intended.

Judgment for the plaintiff on the demurrer.

T. J. Clayton, Esq., for plaintiff.

S. H. Hanson, Esq., for defendant.

[Leg. Int., Vol. 31, p. 204.]

STOTESBURY vs. INSURANCE CO.

BONAFON vs. INSURANCE CO.

1. Special pleas to the common counts in *assumpsit* held bad as amounting to the general issue.
2. A plea inconsistent with itself and repugnant, held bad on demurrer.

Opinion delivered *June 20, 1874*, by

THAYER, J.—In these cases the defendant pleaded to the common count in *indebitatus assumpsit* for money paid, laid out, and expended by the plaintiffs for the defendants' use, that the only moneys paid, laid out and expended by the plaintiff, to and for the defendants, and at their special instance and request, were certain premiums paid by the plaintiff on certain policies of insurance, and that the said policies of insurance were obtained by fraud, covin and misrepresentation.

Similar pleas were pleaded to the common counts for money had and received, and for money due and owing upon an account stated.

These pleas were doubtless constructed upon an experimental hypothesis, the pleader calculating the chances that their vice might be overlooked by his adversary, who was expected to traverse them and so give the defendants the affirmative of the issue and the last word to the jury at the trial. But the plaintiff's attorney was too astute to fall into the snare, and without further parley challenged them all by a peremptory demurrer.

A special plea to a count for money paid for the plaintiff's use is bad, as amounting to *non assumpsit*, if the facts stated deny that the money was paid to the defendant's use; or if it alleges that it was paid under circumstances which do not raise an implied *assumpsit* on the part of the defendant. So also a special plea to a common count for money had and received which denies that the defendant received the money under circumstances which make such a receipt by him a receipt to the use of the plaintiff, is plainly bad for the same reason. These points have been frequently ruled: *Solly vs. Nash*, 5 Tyr. 625; 2 C. M. & R. 355; *Regil vs. Green*, 1 M. & W. 328; *Morgan vs. Pebrer*, 3 Bing. N. C. 457; *Gregory vs. Hartnoll*, 1 Tyr. & G. 303; 1 M. & W. 182; 4 Dowling's Rep. 695, S. C.

The plea to the common count for money due upon an account stated is obnoxious to still greater objection, for it alleges in the same breath that the money was due to the plaintiffs by the defendants upon an account stated, and that it was not due by reason of a fraud in the consideration. If the defendants meant to have admitted that they agreed to an account stated with the plaintiff, and that they were induced to agree to it by a fraud, they might doubtless have pleaded that by apt words, but the plea which they have filed is, in its several parts, contradictory and repugnant, and the general rule is, that a pleading inconsistent with itself or repugnant, is bad; *Stephens on Pleading*, 420 (2d edition); 14 East, 291; *Barber vs. Summers*, 5 Blackf. 339, 1 Ch. Pl. 232

Judgment for the plaintiff on the demurrer.

T. J. Clayton, Esq., for plaintiff.

George Biddle, Esq., for defendant.

[Leg. Int., Vol. 31, p. 204.]

CHEW vs. CLOSE.

Non assumpsit to the whole declaration and a tender as to part cannot be pleaded together.

Rule to strike off the plea of tender. Opinion delivered *June 20, 1874*, by

THAYER, J.—The defendant, after pleading *non assumpsit* to the whole declaration, has pleaded a tender of \$533.40, parcel of the said several sums of money in the plaintiff's declaration mentioned. This is, undoubtedly bad pleading, for the tender admits the contract to the extent of the sum tendered, and is therefore inconsistent with a denial of the whole demand, and it is not within the privilege afforded a defendant by the statute of Ann, 1 Saund. 33, c. note; *Dougall vs. Bowman*, 3 Wils. 145; 3 Bl. Rep. 723; *Maclean vs. Howard*, 4 T. R. 194. The proper plea for such a case as this is *non assumpsit* except as to part and a tender of that sum. The defendant has leave to amend.
Samuel Dickson, Esq., for plaintiff.

[Leg. Int., Vol. 31, p. 204.]

FREYTAG vs. BAMFORD.

The court will not adjudicate the rights of claimants to a fund in the hands of the sheriff raised by an execution. The sheriff must distribute the fund himself at his own peril, or pay it into court.

Case stated. Opinion delivered *June 20, 1874*, by

THAYER, J.—By the case stated we are asked to adjudicate the conflicting claims of several creditors to a fund in the hands of the sheriff raised by an execution. We must decline to assume any such jurisdiction. Were we to do so it is doubtful whether we could enter any judgment which would be binding upon the sheriff, or which would protect him in his payments. The money being in the sheriff's hands the question as to how he should distribute it is for him alone, unless he will pay it into court. He must distribute it at his own peril, or free himself from responsibility by paying the money into court, where it will take the usual course, and the rights of the claimants will be determined by an auditor.

Case stated dismissed.

Jas. Otterson, Esq., for plaintiff.

J. H. Connellan and Wm. McCandless, Esqs., for defendants.

[Leg. Int., Vol. 31, p. 212.]

LEECH vs. LEECH, DEFENDANT, AND THE PHILADELPHIA BOARD OF BROKERS, GARNISHEES.

The proceeds of the sale of a seat in the board of brokers of a member who failed to settle with his creditors, when sold under the articles of association of the board, are first applied to his creditors in the board.

Opinion delivered *June 27, 1874*, by

LYND, J.—We are spared the necessity of deciding whether the seat of a member of the Philadelphia board of brokers is a mere personal

privilege or personal property; whether, when such seat has been sold, in consequence of the insolvency of such member, he (or his creditors) can, in any event, claim any part of the proceeds of such sale.

Under the articles of association of said board "the seat of a member who fails to settle with his creditors within a year from the time of his suspension, shall be sold by the secretary, and the proceeds shall be paid pro rata to his creditors in the board." The seat in question was regularly sold in pursuance of this provision, and the proceeds are insufficient to discharge the claims of defendant's creditors in the board.

Surely the effect of the provision just quoted was to place the seat (without regard to its technical designation or classification) in the hands of the secretary, in pledge to pay the claims his fellow-members might have upon him in the event of his suspension and of his failure to settle with his creditors within one year from the date thereof. Upon this condition he became possessed of his seat. Can he now repudiate the condition? Have his outside creditors any higher rights?

When he, or they, shall have paid off the claims of his fellow-brokers upon this fund, there will be room for the discussion of the question presented on behalf of the plaintiff, at the argument of this case stated.

Judgment for the garnishees.

E. Hunn Hanson and Daniel Dougherty, Esqs., for plaintiff.

A. Sydney and George W. Biddle, Esqs., for defendant.

[Leg. Int., Vol. 31, p. 228.]

McNAIR *et al.* vs. CLEAVE *et al.*

The District Court will not, under ordinary circumstances, re-hear a motion for an injunction which had been heard and refused by a co-ordinate court.

In equity. Bill for injunction to restrain infringement of the name "Galaxy publishing company," trade mark.

A motion for a special injunction having been refused by Judge Paxson (Legal Intelligencer, July 3, 1874), in a suit in the Court of Common Pleas between the same parties, the bill in that court was "discontinued," and an amended bill filed in the District Court. On the hearing before Briggs, J., the counsel for plaintiffs having called his attention to the proceeding before Paxson, J., he expressed a desire to first hear an argument as to the question, whether a second application should be entertained after it had once been refused by a court of co-ordinate jurisdiction, and intimated that his inclination was, that he ought not to reconsider the case, at that time, upon its merits, but should follow the ruling of the other court.

After argument, he stated that his views were unchanged, and that on grounds of policy, he thought it of the utmost importance that the courts of this county should decline to interfere with one another's actions.

In view, however, of the importance of the question, he invited an argument before the court *in banc*, then in session.

After argument before Thayer, Lynd, Briggs and Mitchell, J.J., the opinion of the court was delivered by Thayer, J., to the effect that after a motion had been heard by one judge of a co-ordinate court, no judge of this court would, under ordinary circumstances, rehear that same motion.

Injunction refused.

Thomas J. Ashton and R. P. White, Esqs., for plaintiffs.

Samuel Dickson, Esq., for defendants.

[Leg. Int., Vol. 31, p. 236.]

THE FOURTH NATIONAL BANK vs. FRAZIER.

1. The maker of a promissory note is by the form and effect of his contract a principal and cannot reduce his responsibility to the holder to that of a surety by proof that he made the note for the accommodation of another party and that that was well known to the holder at the time he received it.
2. Therefore the maker of a promissory note is not discharged from responsibility to the holder who discounted it for another person, by proof that the holder knew that the maker was an accommodation maker and neglected to issue an execution upon a judgment which he held as a security for the note, when notified to do so by the maker.

Rule for a new trial. Opinion delivered July 17, 1874, by

THAYER, J.—The facts as they appeared upon the trial were, that the defendant made his promissory note for \$2500, payable to the order of James S. Chambers, who indorsed it. The note was made for the accommodation of Alexander Cummings, who procured its discount by the plaintiffs, the bank placing the proceeds to his credit. At the time of obtaining the discount Cummings confessed a judgment to the plaintiffs for a larger amount as a security for the note and for renewals of it. When the note in suit (which was a renewal of the original note) fell due, the defendant, who was the maker of the note, notified the plaintiffs to proceed against Cummings upon the judgment which they held against him, and it was admitted on the trial that by an execution against Cummings at that time the money might have been made. The plaintiffs neglected to do so and Cummings' property was swept away by executions issued by other creditors. The question is, whether the defendant is discharged from responsibility to the plaintiffs by reason of these facts. He insists, that although he was maker of the note, yet as he was an accommodation maker, and as that was well known to the plaintiffs when they discounted the paper for Cummings, his real relation to the plaintiffs was that of a surety only, and that having neglected upon due and sufficient notice from the surety to proceed against the principal, the plaintiffs have lost their remedy against him.

It was settled many years ago in *The Bank of Montgomery County vs. Walker*, 12 S. & R. 382, and 9 Ib. 229, that the maker of a promissory note cannot reduce his liability to that of a mere surety by proof that he made the note for the accommodation of another party, and that that was well known to the plaintiffs who had discounted it for the party accommodated with a full knowledge of the facts. "We must assume," said Tilghman, C. J., "this broad principle, that the man who draws a promissory note for the purpose of negotiation must stand to it. He has placed himself in the situation of principal, and shall not afterwards escape by alleging that he was but a surety. Although the plaintiffs knew that the defendant received no value from Walker and George, the payees, yet they knew also that it was his choice to serve his friends by placing himself in the front of a negotiable instrument, and they had a right to suppose he was willing to abide the consequences. We think it safest for the mercantile world in general as well as for the parties immediately interested in accommodation paper to lay down the law on these principles, which are warranted by the best authority." It was accordingly held in that case, that the defendant, who had made the

note for the accommodation of another person, was not discharged by the fact that the holder with a knowledge of that fact had given time to that person.

Judge Duncan, in deciding the same point in the same case two years before, had already expressed himself to the same effect. "The man," said he, "who, to serve his friend, lends his name as his debtor, in order that he may obtain money on that evidence of debt, cannot complain of it as a grievance, that when this purpose is answered, the law will consider him just in the character he has assumed. If drawer to be treated as drawer, if indorser as indorser. As he chose to be introduced into the world by the name and in the character of drawer, he must be content to pass through in all its stages under that name, and he cannot at his pleasure cast it off and deny it to any who has given credit to the paper on his assumed name and character. It shall be taken *pro veritate* that he was the drawer, for *de veritate* that was the very thing he was intended to be." 9 S. & R. 240.

The Bank of Montgomery County vs. Walker has been so often recognized and approved by the Supreme Court that the doctrine of that case must now be regarded as the settled law of this State. I will refer to two only of the later cases which fully confirm and corroborate it: *White vs. Hopkins*, 3 W. & S. 99, and *Lewis vs. Hanchman*, 2 Barr, 416. In the former case the doctrine was carried to the extent of deciding that an accommodation acceptor was not discharged by a formal release of the drawer by the holder, who had full knowledge when he received the bill that it had been accepted only for the accommodation of the drawer, and that the acceptor had received no consideration whatever. If an accommodation maker of a note or acceptor of a bill is not discharged by a formal release of the person accommodated and whom he brings forward to stand in his place as a principal while he himself assumes the more modest one of a surety, *a mul to fortiori* is he not discharged by a mere neglect to pursue him, which is the present case.

But *Lewis vs. Hanchman* resembles the present case still more strongly. It was there held that the maker of certain accommodation notes was not entitled to the privilege of a surety, although the debt was lost by the neglect of the holder to record a mortgage which he had received as a security for the notes from the person for whose accommodation the notes were made.

These decisions rest upon the principle that one who by the form of this contract has consented to assume the responsibility of a principal, shall not be permitted to show, in the teeth of his contract, that he ought only to be regarded as a surety. Having expressly agreed to stand as a principal he shall not be permitted to say that the concomitant circumstances reduce his responsibility to that of a mere surety.

Rule discharged and judgment for the plaintiff on the point reserved.

George M. Dallas, Esq., for plaintiff.

John Cadwalader, Jr., Esq., for the defendant.

[Leg. Int., Vol. 31, p. 244.]

DIMOND vs. DIMOND.

The will in this case held to create a trust for each of the children, which expired only on their respectively attaining the age of twenty-eight.

In equity. On bill and answer. Opinion delivered July 25, 1874, by THAYER, J.—The will of Joseph Dimond, upon the correct interpretation of which depends the question whether the complainants are entitled to a decree of partition at the present time, is evidently the production of a man *inops consilii*, and with little power of his own to express the intentions which he had formed. Nevertheless, through all its obscurity and inaccurate use of language one purpose seems perfectly apparent, that is that his children shall not be the masters of their several shares of the real estate until they arrive respectively at the age of twenty-eight years. There is by necessary implication from the powers given a devise to the executors in trust for his children until they respectively attain the age of twenty-eight years. Their several shares are to be allotted to them in turn as each reaches the designated period, provided the executors should not at that time be of the opinion that it would be better to withhold the share of any child and to pay him or her the rents or interest only—a discretion which has probably faded from existence, as its foundation was a personal confidence, and those in whom it was reposed are now dead. The general trust, however, has of course survived those who were relied upon by the testator to administer it, and is now, by an order of the Orphans' Court, committed to John T. Dimond, one of the testator's children, who is over twenty-eight years of age. Joseph Dimond, the defendant, has also reached the required age. Richard and Catharine have not yet attained it, and therefore are not yet in a position to demand for themselves an allotment of their respective shares in severalty. The time, however, having arrived when John T. Dimond and Joseph Dimond are entitled to a partition of the estate and an allotment of their several shares, the former, who is plaintiff in this bill, is entitled to maintain it in his own right; and representing, as trustee of Richard and Catharine, their interests also, he is also entitled in that capacity to have their shares set off from his own and from that of his brother Joseph. The result will be that the estate will be divided. John and Joseph will be allotted their several shares respectively, and John will hold the shares of Richard and Catharine in trust until the time arrives when by the directions of the will they are to be transferred to their own control. The prohibition in the will against any right or claim on their part to sell or encumber their portions until they respectively arrive at the age of twenty-eight years, and the clause which expressly designates that as the period when they are to receive their respective shares, coupled with the powers which are given to the executors over the estate in the meantime, demonstrate too plainly to be disregarded that the testator intended the creation of a trust to endure until the prescribed age shall be reached. Let a decree be drawn accordingly.

[Leg. Int., Vol. 31, p. 340.]

IN RE LUCAS HIRST AND JARED INGERSOLL.

1. The court will not punish for contempt when the act has not been committed in their presence and there is another mode of punishment.
2. Where an attorney undertakes to obtain bail for his client he will be held responsible for any fraud or deception on the court in obtaining and justifying the bail.

Opinion delivered *October 21, 1874*, by

HARE, P. J.—There are two rules before the court: one that the respondents should answer for a contempt of court; the other to show cause why they should not be disbarred. Before announcing the conclusion which we have reached, it is proper that I should briefly recapitulate the evidence. Johnson and Delaplaine, persons residing and doing business in this city, were desirous of issuing a writ of replevin. Unable to find bail, they applied to Mr. Lucas Hirst, who undertook, as their attorney, to issue the writ and procure the bail. Agreeably to Mr. Hirst's statement under oath, which there is nothing before us to contradict, he did not personally endeavor to procure the bail, but turned the matter over to Jared Ingersoll, the other respondent. Design or accident led Mr. Ingersoll to Drew and Thomas D. Fawcett, who agreed to become the sureties in the replevin. The case cannot be understood aright without considering what these men are. Agreeably to Fawcett's testimony, it had been agreed between him and Drew, that they should make money by entering bail. To enable Fawcett to swear that he was a freeholder, Drew promised Fawcett a deed for a lot in Kater street, and Fawcett paid him fifteen dollars, but did not receive the deed. It is not pretended that Drew owned or was possessed of any such real estate. He had, agreeably to Fawcett, deeds for sale at prices to suit purchasers.

The interview between these men and Ingersoll occurred on the 8th of September, and Fawcett went with Ingersoll the same day to the Court of Common Pleas, and there executed an injunction bond as surety under the name of Thomas Davis. Two days afterwards Ingersoll brought Drew and Davis to the prothonotary's office of this court, and there offered them as sureties in the replevin issued at the instance of Johnson and Delaplaine. Judge Briggs, who happened to be in the office, said that he would hear the case in the room where we are now sitting. Mr. Hirst, who was sent for, came into the office, filled up the bond, and went with Drew and Fawcett before Judge Briggs. They were then sworn, and accepted as bail; Fawcett giving his name as Thomas Davis, and testifying that he owned a house and lot in Kater street. They executed the bond, and Mr. Hirst gave them ten dollars, for their time, risk, and trouble. Both Hirst and Ingersoll have denied under oath, that they had any knowledge or idea of the fraudulent nature of the transaction. Fawcett has since executed bonds in two other cases, one under the name of Fawcett, and one which he signed as James.

In considering the rule on the respondents to answer for a contempt, the court has been influenced by the nature of the proceeding. A party who is called on to meet such a charge is necessarily in the hands of the

court, and cannot have the aid of a jury for the determination of any controverted question of fact that may arise during the hearing. It is proper, therefore, that the court should proceed cautiously. Where the offence is committed in the presence of the judge, and there is no denial on the part of the accused, it may be visited by an appropriate penalty. Such was the case of Fawcett, whom we sentenced a few days since to three months imprisonment for his share in this transaction. On the other hand, where the guilt of the accused depends on circumstantial evidence, or is an inference from facts which do not occur in the presence of the court, and are denied by him, he should not be convicted of a contempt, unless there is no other way of attaining the ends of justice. This cannot be said in the present instance, because the subornation of perjury and a conspiracy to impose on the court by the fraudulent production of bail, are offences under the common and statute law, and within the reach of an indictment. The rule to answer for a contempt is therefore discharged; but it is at the same time ordered that a certified copy of the evidence which has been given in this case be transmitted to the District Attorney.

In considering the remaining rule we wish to be distinctly understood as saying that an attorney is not responsible for the character of the bail presented by his client, unless there is some fact or circumstance which should rouse suspicion or put him on inquiry. If nothing appears to the contrary, he may take it for granted that the principal is honest, and that the sureties do not intend to commit perjury. But an attorney who undertakes to procure bail, not only assumes the responsibility that a party is under when acting for himself, but should act with more circumspection in view of his duty to the court. He cannot get rid of this obligation by employing a subordinate and then closing his eyes to what the latter does.

This is peculiarly true where the character of the agent is not such as to inspire confidence or justify a blind reliance on his truth. And here I may advert to the evidence which has been laid before us by the committee of the law association. It appears from the record which they adduced, that the respondent, Ingersoll, was convicted of larceny in the Court of Quarter Sessions. It has been urged on his behalf that he was subsequently pardoned by the Governor, and it is harsh to revert to a fault which the bar and the community may have supposed to condemn. Seven years have passed, and if it was necessary to bring the fact before this court, it should have been done at an earlier period. Abstractly, this argument may be sound, but it does not apply to the purpose for which the record was offered.

The conviction of an attorney for an offence involving moral turpitude is a sufficient cause for his removal from the bar. No court which has the evidence before it, should hesitate as to the course to be pursued. To be convinced of this, we need only reflect that the office of an attorney is a privilege which is obtained through an order of the court, founded on evidence that he possesses the requisite learning, and is of good moral character. And as he obtains admission through the court, so it is the right and duty of the court to remove him, if it appears from his subsequent conduct that their confidence was ill placed. The community may therefore regard his continuance in office as an assurance

that nothing has been brought to the judicial knowledge of the court, which renders him unfit for the grave responsibility attached to such a calling.

A conviction for an infamous offence is consequently a ground of disqualification, which should not be passed by in silence. The case is different, where an attorney, who has been sentenced in the Quarter Sessions, is suffered to continue for many years in the practice of his profession in a civil tribunal, without any step being taken to bring the record of his conviction before the judges. Still one who is thus placed should remember that he is, to some extent, on sufferance, and proceed circumspectly in the performance of his official duties.

If circumstances occur, tending strongly to show that he has been guilty of misfeasance, there is not the same presumption in his favor, as in that of a man of unblemished character, and he cannot expect that his testimony in his own behalf should receive implicit credence. It is in this respect that we regard the conviction of Ingersoll as properly before us, and as having material bearing on the case. He it was who found the fraudulent bail and brought them into the prothonotary's office. This was not his first knowledge of Drew, if we credit Fawcett's testimony. In view of all the circumstances, we are unable to acquit him of malpractice, and therefore make the rule, to strike his name from the list, absolute.

As it regards the respondent Hirst, there is no proof that he was cognizant of the fraudulent nature of the bail. That he had such knowledge is denied, not only by him, but by Ingersoll and Fawcett. But we regard him as having been grossly negligent in turning the matter over to Ingersoll, and in accepting what the latter did without inquiry. If he was in the line of his duty as an attorney in undertaking to procure the bail, and in presenting them to Judge Briggs, he went beyond it in paying them for their services. Before taking such a step he should have made a careful investigation, and investigation would, as we believe, have led to a discovery of the iniquity to which he was, however, unconsciously making himself a party. It seems to us, however, that the case does not require his dismissal, and that it is enough to suspend his privilege as an attorney. We are spared the necessity of considering how long the sentence should last, because this court will cease to exist as such at the close of the current year. To sentence Mr. Hirst for a longer period would be merely formal. It is therefore ordered that he shall not act as an attorney until January 1, 1875.

Hon. *Benjamin Harris Brewster*, for Hirst.

William F. Johnson, Esq., for Ingersoll.

[*Leg. Int.*, Vol. 31, p. 340.]

BOILEAU vs. THE LIFE INSURANCE COMPANY.

A challenge to the favor allowed in a civil suit.

This was an action upon a policy of insurance, which contained a proviso that if the insured should "die by suicide" the policy should be void. The defendant pleaded that the insured committed suicide by drowning himself; to which the plaintiff replied, that the insured was

insane at the time he died, and that his death was not his voluntary and intelligent act.

When the case was called for trial at Nisi Prius, on October 14, 1874, before Hare, P. J., the defendant's counsel was permitted to ask each juror as he was called, upon his *voir dire*, this question: "Do you hold the opinion that the fact that a man has committed suicide is conclusive proof that he was insane at the time he committed the act." Such of the jurors as answered in the affirmative were challenged for cause and the challenges were sustained.

On the trial, the question, whether the policy in suit was forfeited by the suicide of the insured, he being insane at the time, but intending to take his life, knowing that death would result from what he did, was reserved for the consideration of the court in banc.

The jury found for the plaintiff that the insured was insane when he committed suicide.

Messrs. J. R. and G. R. Snowden, for plaintiff.

Messrs. W. S. Price and M. Arnold, for defendant.

[Leg. Int., Vol. 31, p. 356.]

FRAILEY vs. THE CENTRAL FIRE INSURANCE COMPANY OF PHILA.

An attachment was issued against a corporation, and a judgment obtained on it; but prior to the judgment the corporation was dissolved and a receiver appointed: *Held*, that the attachment should be set aside, and the property handed over to the receiver.

Statement of the case.—In this case suit was begun by the plaintiff by an attachment under the act of April 17, 1869. After the service of the attachment, proceedings were commenced at the instance of the Commonwealth, to dissolve the corporation, and on the 7th October, 1874, a decree was made by the Court of Common Pleas of Dauphin county, Pennsylvania, dissolving the company and appointing Colonel A. Wilson Norris, receiver. On the 10th of October, plaintiff obtained judgment and issued execution, and the sheriff took possession of the property and refused to deliver the same to the receiver. The receiver filed a petition setting forth these facts, and asked that the levy and execution be set aside after argument.

William McMichael, Esq., for plaintiff.

Samuel G. Thompson, Esq., for receiver.

Opinion delivered October 26, 1874, by

BRIGGS, J.—Before the plaintiff obtained his judgment, the defendant corporation had been dissolved according to law, and hence, had no legal existence at the time of judgment. Such a judgment is as ineffectual as would be a judgment given against a dead person, though such deceased person were alive at the institution of the suit. The issuance of the attachment under the act of April 17, 1869, is an assertion by the plaintiff of his right of action against the defendant, but it is not an adjudication of such right; nor has it such effect.

In this case the defendants being *functus officio* at the time of the judgment, the judgment does not estop the receiver. This was expressly ruled in *Farmers' and Mechanics' Bank vs. Little*, 8 W. & S. 219. Hence the *fi. fa.* and levy are set aside.

Rule absolute.

[Leg. Int., Vol. 31, p. 356.]

WHELEN *vs.* THE CATAWISSA RAILROAD COMPANY *et al.*

The act of April 24, 1874, for the taxation of corporations, does not repeal the 5th section of the act of May 1, 1868, either in terms or by implication; it only provides additional security for the payment of the State taxes.

In retaining the tax from dividends, the Catawissa Railroad Company must deduct it, pro rata, from the dividends on the old preferred and the new preferred stock.

In equity. Motion for a preliminary injunction.

Under its charter granted in 1860, the stock of the Catawissa Railroad Company consisted of preferred and common stock.

The preferred stockholders were guaranteed a certain dividend per annum, and all arrears thereof, before any dividend was to be paid to the common stock.

On the 29th of December, 1869, an act of assembly was passed, by which corporations were authorized to increase their capital stock, and to sell and dispose of the same on such terms and conditions as to said corporation may seem proper.

This act was accepted by the Catawissa Railroad Company, and a new preferred stock issued, restricted, however, as to the amount of dividend to be received. There was no stipulation in the charter, and no agreement on the part of the company, to pay the tax on the old preferred stock, and it had always been held liable to tax, and the State tax had always been retained by the treasurer from dividends, and paid over to the State treasury under the 4th and 5th sections of the act of May 1, 1868.

By the act of April 24, 1874, entitled an act for the taxation of corporations, the 4th section of the act of May 1, 1868, was repealed, and for it was substituted the 4th section of the act of April 24, 1874.

By the 4th section of the act of May 1, 1868, it was provided that "*the capital stock of all companies whatever, shall be subject to and pay a tax into the treasury of the Commonwealth annually at the rate of one-half mill for each one per cent. of dividend made or declared.*"

This was repealed by the act of April 24, 1874, and for it was substituted the 4th section of that act, which provided that "*every railroad company,*" etc., shall be subject to and pay a tax into the treasury of the Commonwealth annually at the rate of nine-tenths of one mill, upon its capital stock, for each one per cent. of dividend made or declared."

The Catawissa Railroad Company, construing the act of 1874 as a tax upon the corporation, and not upon its stock, and therefore that the tax is to be deducted from its revenue before any dividends can be made to its stockholders, and that the provisions of the 5th section of the act of 1868, providing that the tax should be deducted from dividends, were not re-enacted in the act of 1874, proposes to deduct the whole tax from its income, out of what remains to pay the old preferred stockholders their full dividend without any tax deducted, and to pay what is left to the new preferred, which gives them less than fifty per cent. of the dividend they are entitled to if the tax were deducted pro rata from both dividends.

This construction was resisted by plaintiff, a holder of shares of the new preferred stock, who applied for an injunction, and for a prelimi-

nary injunction restraining the company from making such a disposition of its income until final hearing, as will take more than the pro rata of tax from the dividend due to the holders of the new preferred stock.

William H. Drayton, Esq., for injunction.

James E. Gowen, Esq., contra.

The case was heard before Hare, P. J., and Briggs, J.

Opinion delivered *November 2, 1874*, by

BRIGGS, J.—Viewing the several acts taxing corporations as parts of a code to raise revenue for the Commonwealth, and as not intending, without words to express such intent, to release any remedy or lien already existing, we have this result:

The 4th section of the act of May 1, 1868, establishing a tax rate against stocks, was repealed by the act of April 24, 1874; and by the 4th section of the last revenue act, a new rate was simultaneously created, thus substituting, as it were, thenceforth the new rate for the old.

And reading the act of April 24, 1874, in connection with the 5th section of the act of May 1, 1868, which has not been repealed, the tax is, by express words, to be retained and deducted from the dividends declared.

Nor is the act of April 24, 1874, making the company also liable for the tax, inconsistent with this view.

It means that without releasing the dividend the company shall also be liable; and why not? The company declares the dividend, handles the money with which to pay it, and thus has the means of indemnity in its own hands, against the liability imposed upon it.

The dividends, then being liable for the tax, each and every dividend should pay its pro rata.

This the company as between the owners of the dividends, is bound to see done or pay the tax itself.

From this it follows, that the Catawissa Railroad Company has no power to charge what is called the "new" preferred stock with that portion of the tax, which should be paid from the dividends of the stock issued pursuant to the act of March 21, 1860, and we accordingly order that said company be restrained from doing so upon the plaintiff giving security in \$1000.

Let a decree be prepared in accordance with this opinion.

[*Leg. Int., Vol. 31, p. 404.*]

CARTER *vs.* WALLACE.

Judgment for want of an affidavit of defence cannot be entered against a defendant in an attachment execution.

Rule for judgment. Opinion delivered *December 12, 1874*, by

THAYER, J.—The question raised in this case is, whether the plaintiff is entitled to judgment for want of an affidavit of defence against a defendant in an attachment execution. If the novelty of the plaintiff's application constituted a sufficient answer to it, undoubtedly he would be very summarily dismissed, for it is believed that no other instance of such a rule can be found upon the records of this court. But the

grounds of the plaintiff's experiment are, nevertheless, entitled to a deliberate examination. By the act of assembly the plaintiff is entitled to judgment for want of an affidavit of defence in all actions instituted in this court on bills, notes, bonds, book debts, etc., and in all actions of *scire facias* on judgments. It is not pretended that this is an action on bills, notes, bonds, book debts, etc., but it is said to be within the meaning of the words "in all actions of *scire facias* on judgments." And this construction is insisted upon because the attachment execution, agreeably to the act of 1836, contains a clause in the nature of a *scire facias* against a garnishee in a foreign attachment, requiring the garnishee to appear and show cause why the judgment should not be levied of the effects of the defendant in his hands. Now the words in the act relating to judgments for want of an affidavit of defence, "in all actions of *scire facias* on judgments," have a perfectly precise and well defined meaning. They refer to actions of *scire facias quare executionem non* and to actions of *scire facias* to revive judgments. These are actions upon judgments. But an attachment execution is not an action at all, at least relatively to the defendant. It is an execution upon a judgment; the attachment process is only auxiliary to the other methods of execution, and what is called the *scire facias* clause in the writ is not a *scire facias* upon the judgment against the defendant, or indeed a *scire facias* at all, but "a clause in the nature of a *scire facias* against a garnishee in a foreign attachment," to which proceeding the proceedings in the attachment execution are assimilated by the act of assembly. The *scire facias* clause is a part of the execution. It may, to be sure, bring new parties into court and produce new litigation, but this is all in execution of the judgment against the defendant. By no ingenuity of construction, therefore, can such a proceeding be brought, either within the words or the meaning of the affidavit of defence law.

Rule discharged.

[Leg. Int., Vol. 31, p. 404.]

McINNIS vs. SMITH.

Where the plaintiff issued successively a summons which was returned "*nihil*," an *alias* summons which was returned "*nihil*," and a *pluries* summons which was returned "served," held, that having filed a copy of the instrument on which his suit was founded, within two weeks after the return of the *alias*, he was entitled to judgment for want of an affidavit of defence.

Rule to strike off the judgment. Opinion delivered December 12, 1874, by

THAYER, J.—The plaintiff issued a summons returnable to the third Monday of September, 1874, which was returned "*nihil habet*." He then issued an *alias* summons, returnable to the first Monday of October, 1874, and on October 6, 1874, filed a copy of the promissory note upon which the action was brought. The *alias* was also returned "*nihil habet*." The plaintiff then issued a *pluries* summons returnable to the first Monday of November, 1874, which was returned "served," and judgment was entered for want of an affidavit of defence November 25, 1874. It is contended that the judgment was erroneously entered, because the act requires the copy to be filed within two weeks after the return "of the original process," and the defendant maintains that the first summons

issued was the "original process" intended by the act, and that neither the *alias* nor *pluries* was original process. We cannot, however, acquiesce in this view of the defendant. At common law all process used to compel the defendant's appearance was denominated original process, because it was founded on the original writ which issued out of the Court of Chancery. Thus, the attachment, the *distringas*, the *capias ad respondendum*, and the *exigent*, which were the successive steps to compel an appearance if the defendant disobeyed the summons to appear in court at the return of the original writ, were all called original process, as well as the summons itself. These writs were, it is true, sometimes called *mesne* process, but that was only by way of contradistinction to *final* process or process of execution, and in that sense the summons itself was called *mesne* process. But in strict legal nomenclature *mesne* process was the intermediate process which issued pending the suit upon some collateral interlocutory matter, as to summon juries, witnesses, and the like. That an *alias* or *pluries* summons, or an *alias* or *pluries capias ad respondendum*, is original process in the sense in which the ancient lawyers understood these words, will hardly be denied by any one who will take the trouble to investigate the sources of the law upon this subject. The mistake is in supposing that original process means only the *first* writ issued, whereas, the designation has no reference to the circumstance of the writ being first in point of time, but was so called because its purpose was to enforce the appearance of the defendant in obedience to the king's command in the original writ out of chancery. The *alias* summons and the *pluries* summons are therefore as much original process as the summons which was first issued. They are new writs reiterating the command of the first, which has been spent by the sheriff's return. "The *alias*," as was said by Gibson, C. J., in *Davidson vs. Thornton*, 7 Barr, 132, "stands in the place of its predecessor, and fulfils every purpose intended to be accomplished by it." When successive writs of summons issue in this way they are all original process in the same suit, and the copy required by the act of assembly to be filed within two weeks after the return of the original process, may be filed within the prescribed time after the return of either of them. This construction of the act of assembly has, so far as we are informed, always obtained in this court, and very many judgments have been entered in accordance with it.

Rule discharged.

[Leg. Int., Vol. 31, p. 396.]

MOELLING, ADMINISTRATOR, vs. THE LEHIGH COAL AND NAVIGATION COMPANY.

In an action on the case for the wrongful cancelling of a certificate of loan, and the transfer of the loan to another party without authority, the defendant may be compelled under the act of 1798, to produce at the trial the books and papers relating to the transaction.

The act of 1798 was intended to accomplish the same purpose in a court of law as a bill of discovery in equity, and should be construed upon the same principles.

The language of *Morgan vs. Watson*, 2 Whart. 10, must be considered as applied only to a case of such tort as involves penalty or forfeiture.

Rule under the act of 1798, to produce papers at the trial.

This was an action on the case for the wrongful cancellation of a cer-

tificate of loan, in the name and belonging to C. A. Goldmeister, plaintiff's intestate, and the transfer of the loan upon the books of the defendant to a third person without authority. There was a second count in trover for the certificate.

Opinion delivered *December 3, 1874*, by

MITCHELL, J.—The 15th section of the act of Congress of 24th September, 1789, known as the judiciary act, authorizes the courts of the United States in actions at law, to require the parties to produce books or writings in their possession or power, "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." The Pennsylvania act of 27th February, 1798, following the language of the act of Congress so closely as to indicate that it was in the mind of the draftsman, nevertheless omits the limitation to cases where parties might be compelled in chancery, and provides generally for the compulsory production of books or writings "in any action depending before" the courts. Whether the limitation was omitted from that feeling of repugnance to chancery jurisdiction so long prevailing in this State, or from some other reason, it is quite clear that it was not the legislative intention to make the scope of our act any narrower than that of the act of Congress. The general purpose of the two acts is precisely the same, and the same penalties are provided for the enforcement of the order. In *Cottrell vs. Warren*, 6 Har. 487, Lowrie, J., says: "The act of 1798 was intended to supply the want of a bill of discovery, . . . and it ought to be enforced freely and decidedly in its true spirit." Although, as he goes on to say, the latter is in some respects a much better remedy.

Treating the order under this act, then, as a substitute for a bill of discovery, we come to the question, whether such a bill would lie in the present case, and the answer is not at all doubtful.

In *Hare on Discovery*, page 118, it is laid down as the general rule, that "it is no objection that the discovery be sought in aid of actions which sound in tort."

In *Sloane vs. Heatfield*, Bunbury, 18, a bill was filed to recover a treasure trove, and to discover what was found. The court said the bill was proper enough as to the discovery, but plaintiff could not have the relief because he might bring his action of trover. To the same effect is *Taylor vs. Orompton*, Bunbury, 95, where a bill was sustained to discover the amount of coal taken by a trespass.

East India Co. vs. Evans, 1 Vernon, 306, was a bill of discovery against defendants to show how they had traded in the East Indies, so as they might be compelled to bear a proportionable part of the charges of the company for building forts, maintaining an army, etc. A demurrer was filed on the ground that the discovery was sought as a means of making defendants chargeable with damages, but Lord Keeper Guilford overruled the demurrer, saying, "it is a mistake to say a man shall not have a discovery in this court for matters that sound in tort."

In the *Earl of Macclesfield vs. Davis*, 3 Ves. & Beames, 17, an order was made for the inspection of an iron chest of heirlooms, in order to gain knowledge so as to bring trover for the heirlooms. Lord Eldon said, "this bill aims only at another mode of discovery in a way less

expensive than by answer; and if plaintiffs had filed a bill of discovery in aid of an action of trover they must have had it."

To the same effect are *Atwill vs. Ferrett*, 2 Blatchf. 45; and *Finch vs. Rikeman*, Id. 301, where it was held that defendants might be compelled to disclose violations of the copyright and patent laws, provided the bills waived the forfeitures and penalties incurred, and sought only damages.

In opposition to this unbroken line of adjudication, we are referred to the case of *Morgan vs. Watson*, 2 Whart. 10, where the Supreme Court are reported as saying that the act of 1798 was "obviously inapplicable to an action founded upon a tort." The action was for libel, and the case is reported with extreme brevity. It is clear, however, that the case fell within a well-settled exception, that a court of equity will not aid in the enforcement of a forfeiture or a penalty. "If the answer of the defendant," says Mr. Hare (on Discovery, page 131), "might be evidence tending to subject him to punishment by any judicial or competent authority, or to any penalty or forfeiture," he will not be compelled to make the discovery.

This is the true criterion, and we think it is all that the Supreme Court meant to lay down in *Morgan vs. Watson*. The case fell clearly within this settled exception, and the language of the report, perhaps not even professing to be the exact words of the court, must be interpreted in reference to the case actually before them.

In *Tuttle vs. Mechanic's and Tradesman's Loan Co.*, 6 Whart. 216, an order for the production of books was made in a special action on the case for refusing to transfer shares of stock on the books of the defendant company. The objection that such an order could not be made in an action of tort was not made by counsel or suggested by the court, although it would have been vital to the case, as judgment was entered against defendant for failure to produce a paper called for by the rule. This precedent, so analogous to the case before us, seems to be conclusive of the understanding of the court that decided *Morgan vs. Watson*, as to the scope of that decision, and of the act of 1798.

Rule absolute.

John Samuel and *G. Remak*, Esqs., for the rule.

Charles Gibbons, Esq., contra.

[Leg. Int., Vol. 31, p. 412.]

GUILLOU vs. PETERSON.

A, residing and doing business in Philadelphia, entered into a special partnership with B, C, and D, residents and doing business in New York city, for one year; the partnership continued thereafter, but as its renewal was not advertised, A, by the New York law, became a general partner with the others.

The other partners, contrary to the articles of copartnership, and without the knowledge of A, went into stock speculations with the trust funds of an estate of which B was one of the executors, and involved the estate in a large loss: Held, that a legatee of said estate could not recover against A for said loss.

Rule to take off nonsuit. Opinion delivered December 19, 1874, by

BRIGGS, J.—I entered judgment of nonsuit against the plaintiffs at the trial, upon their disclosure of the following facts:

On the sixth day of November, 1866, Edward W. Gould, Theodore R. Strong and Jesse White, Jr., of New York city, and Pierson S. Peterson, the defendant, of this city, entered into a special partnership as Gould, Strong & Co., to transact in New York city the business of buying and selling stocks on commission, making loans, collecting promissory notes, drafts and bills of exchange.

Peterson put in the firm as special capital \$20,000, and the articles of copartnership stipulated that in no event should he be liable beyond said sum. Said articles also provided that he should transact no business on account of the firm, nor be employed for that purpose as agent, attorney or otherwise.

Peterson resided in this city and carried on business here of his own. The general partners resided in New York, and prosecuted the business of Gould, Strong & Co.

The law of New York in the formation of the partnership was complied with for the first year, and the partnership was renewed annually, with the exception of publication of the renewals, till 1871 inclusive. By this omission to publish, Peterson was converted into a general partner. While this was technically so, both he and his partners thought him a special partner only, and all of their dealings were on the basis of such a relation.

Strong, with Thomas S. Shepherd, was also executor of the will of Samuel L. Haven, who resided and died in New York. As such executors, they received bonds and stocks of large value belonging to their testator's estate.

The partnership agreement stipulated that the general partners should not enter into speculations of any kind. Strong, Gould and White, nevertheless did so, without Peterson's knowledge, and Strong, with the consent and approval of Gould and White, used in speculations \$25,000 5-20 coupon bonds of the United States, and 471 shares of stock of the Pittsburgh, Fort Wayne and Chicago Railroad Company, belonging to Haven's estate. These speculations resulted in disaster and insolvency to the firm, and the bonds were sold December 14, 1871, for \$28,437.50, and the stocks on January 26, 1872, for \$45,178.75, in payment of the debts incurred in said speculations. Peterson had no knowledge that the trust property had been used, till after the failure of Gould, Strong & Co.

Upon these facts the plaintiffs brought this action for money had and received, against Peterson as a general partner, to recover the proceeds of the bonds and stock, which now, with interest added, amount to \$90,000.

It must be conceded that Peterson, in consequence of the failure to publish the renewals, became a general partner as to those dealing with the firm, within the scope of its business, and the law so regards him, whether his partners so treated him or not.

That one partner, from the implied agency inherent in the law of partnership, may bind his firm within the scope of the partnership business, is undoubted. That he cannot bind it beyond its scope is equally clear. It, hence, follows, that to enable the plaintiffs to recover, they must show that dealing in embezzled property is within the scope of this partnership.

A contract in expressing in words such a purpose would drop to pieces from inherent rottenness, and could not be maintained in any court within the realms of civilization.

In *Ex parte Heaton*, Buck, 386, a father and his sons were partners, and the sons were trustees of a will, and in the stead of applying the trust moneys according to the trust, they appropriated them to the partnership purposes; but on the bankruptcy of the partnership, it was held that the amount of money so appropriated was not provable against the joint estate, unless it could be shown they were employed in the use of the partnership trade, with the knowledge of the father that they were trust funds.

To the same effect is the decision in *Ex parte Apsey*, 3 Bro. C. C. 265.

Mr. Lindley in his work on Partnership, edition 1873, page 327-8, commenting on these cases, remarks:

"It may be thought at first sight, that these cases are opposed to *Marks vs. Keating*, and other authorities, in which it was held the firm was liable for the money which came to its hands. But in those cases, the money came into the hands of the firm in the ordinary course of business, whilst in the cases now under consideration, it is supposed to come otherwise.

"Liability must, therefore, attach to the firm, if at all, upon wholly different principles; and the fact that the firm had the benefit of the moneys is not sufficient to render them responsible for them. To be liable, the firm must be implicated in the breach of trust, and this cannot be, unless all of the partners knew that it did not belong to the partner making use of it. Knowledge on the part of one will not affect the others, for the thing to be known has nothing to do with the firm, and the case of *Ex parte Heaton*, already referred to, shows that in cases of this kind, liability as for a breach of trust does not extend to those who are ignorant of the matters before mentioned."

In *Jaques vs. Marquand*, 6 Cowen, 497, a partner also held money in trust, and without knowledge of his copartner, used it in the business of the firm, and the question there was, was the firm liable? It was held that it was not. In deciding the question, the court said: "It is, then, a question of one partner bringing money into the firm without knowledge or privity on the part of his copartner of its being trust money; and it has been repeatedly held in such cases, that it does not create a joint debt on the part of the firm, which can be proved against the joint estate. For although the partner abuses his trust and advances the money to the partnership, it will not raise a contract between the firm and the *cestui que trust*, nor convert the innocent partners into implied trustees."

The doctrine of *Jaques vs. Marquand* is recognized and approved as authority by our own Supreme Court in *Clay vs. Cottrell*, 6 H. 408.

It is then obvious that, from the foregoing cases, there can be no recovery from the firm of Gould, Strong & Co., upon a contract relation, as the use of the abstracted property was not within the scope of their business as a firm, and if the members are liable, it is because they are implicated in the breach of trust by Strong.

As opposed to such a deduction, the learned counsel for the plaintiffs contend with unwonted zeal that such conclusion is antagonistic to the

decision of *Stone vs. Marsh*, 6 B. & C. 551. An analysis of the latter case, however, shows that such is a mistaken view.

It is true that in that case, Fauntleroy's partners did not know that he, Fauntleroy, who was also trustee with others, had forged the signatures of his cotrustees to the power of attorney to them, his partners, to sell the stock; yet his partners sold the stock, knowing it was trust property, and had the money placed in their agent's bank in their firm's name, instead of to the credit of the trustees, to whom they knew it belonged. And thus, by treating the money as theirs, became responsible for its safekeeping. Lord Tenderden turns the case upon the negligence of Fauntleroy's partners in thus dealing with the money. "It cannot be doubted," he says, "that it was the duty of the house to place the money to the credit of the trustees, and retain it for them and subject to their order, and no . . . neglect on the part of the house, arising from misplaced confidence reposed by them in one of themselves or otherwise, to which the plaintiffs were not parties, can deprive the plaintiffs of their money."

It is, therefore, plain that in *Stone vs. Marsh*, the firm of which Fauntleroy was a member, received the money in the ordinary course of their business, and having so received it, no negligence on their part in permitting Fauntleroy to draw it and appropriate it to his use, could relieve the firm from paying it to its rightful owners.

The case of *Stone vs. Marsh* differs from the case we are considering in other essential details. Here, Peterson did not handle the trust property, nor the money arising from its sale—there Fauntleroy's partners did. Here, neither the bonds nor stock, nor their proceeds, appeared upon the firm's books as trust property or assets—there the stock did. Here, Peterson had no knowledge of the existence of the bonds and stocks—there Fauntleroy's partners had. Here, the trust property was used by Gould, Strong and White in speculations forbidden by the partnership articles, and which were outside the partnership business—there, as already shown, Fauntleroy's partners sold the stock in the ordinary course of their business. Here, Peterson having no knowledge of the trust property, had no reason to suspect it was being used by his partners—there, Fauntleroy's partners knew the stock belonged to the trust estate, and sold it as trust property. Here, Peterson was prohibited by the articles of copartnership from "transacting any business on account of the partnership"—there, Fauntleroy's partners participated in the general management of their firm's business, and thus had the means of knowing what Fauntleroy did.

These points of difference entirely destroy *Stone vs. Marsh* as authority against the conclusion we have reached.

The vice of the plaintiffs' position lies in their assumption that the use of the trust property by Gould, Strong and White in the firm name, without Peterson's knowledge, was within the implied agency of the partnership, and thus bound Peterson also. But who constitute the partnership?—assuredly all of its members, and not a part of them. And if Gould, Strong and White had no power to bind Peterson, by appropriating the bonds and stock, surely their merely using them in the firm name without his knowledge, in dealing with others, could not make the partnership responsible.

The use of the firm name under those circumstances was but a continuation of the original fraud and an intended fraud also upon Peterson. Indeed, it seems that Gould, Strong and White were dealing with a bold hand, both against the plaintiffs and Peterson. In such case, neither of the victims of their fraud can recover of the other. *Grubb vs. Cottrell*, 12 P. F. Smith, 23.

Nor is it the use merely of money by a firm, furnished by a third party, that gives such party a right of action against the firm. That such right should be founded on a contract relation or privity is well sustained by our own Supreme Court. *Clay vs. Cottrell*, 6 H. 408; *Donnelly vs. Ryan*, 5 Wr. 306; *North Penna. Coal Company's Appeal*, 9 Wr. 181; *Bond vs. Aiken*, 6 W. & S. 168; *Graeff vs. Hitchman*, 5 W. 454.

The speculations themselves, in which the trust property was used and lost, were no part of the partnership business, and were expressly forbidden by the partnership articles. The business of Gould, Strong & Co., was in dealing in stocks, that of brokerage merely—to buy and sell for others on commission—and all who dealt with them knew that speculation in stocks was not brokerage.

In *Hamill vs. Purvis*, 2 P. & W. 177, the court said: "An engagement by one partner to bind the partnership credit, in a transaction unconnected with, and not fairly and reasonably within the scope of the partnership, is, as to the other partners, fraudulent and void."

And in *King vs. Faber*, 10 H. 25: "The authority of a partner is limited to the partnership, and the acting partner, like the others, is confined within the same limits."

In *Singer vs. Kelly*, 8 Wr. 145, a limited partnership was formed for the transaction of general commission business. The general partners changed the business by purchasing fifty bales of cotton for \$4200, and sixty tierces of rice for \$2100, for which they gave the firm notes.

These operations being outside the partnership, if known to and acquiesced in by the special partner, would have made him a general partner also, and, as such, liable with other partners for the partnership debts.

The contention was by the plaintiffs that he was liable in any event. The court, however, held that unless he knew of the transactions he was not liable.

Is it not, then, clear that the speculations in stock by Gould, Strong and White, in which the trust property was lost, not being in any sense stock brokerage, did not bind Peterson, who was no party to them?

Nevertheless, if Peterson knew, or should have known of the breach of trust, he is liable: *Lind. on Part.*, Vol. I, 328.

Gould states he does not think Peterson was aware of the loan of the bonds and stock to the firm. He adds: "I never told him. If he ever did know it, it was on one occasion when we were in trouble, in 1868—I think it was in the spring of 1868—the Atlantic mail trouble. Either Strong or myself may have informed him at that time. We had a conversation, Mr. Peterson, Mr. Strong and I. I think it was stated to Mr. Peterson that Mr. Strong had loaned us some available collaterals, for which we had given him Wilkesbarre stock, or other stocks and bonds, upon which we were unable to borrow money, and that Mr. Strong would have to be protected in the matter. I do not remember any other occa-

sion where these loans were mentioned, and I do not know whether he then understood it.

Strong, in his testimony, fixes this interview in April, 1863, and limits the loans referred to, to \$28,000, U. S. 7-30 treasury notes. He further testifies, "he, Peterson, knew of the loan of the treasury notes. He got that information either from Gould or myself; we were both present. I don't know which of us told him. That was in April, 1863. I don't remember what his reply was to that conversation. I don't remember whether he made a reply."

Again, "I think he did not examine into the business affairs of the firm," and that he had never had the books of the firm, nor had they ever been submitted to his inspection.

It is obvious that Gould refers to the loan of the treasury notes made in February, 1867, and not the 5-20 bonds and Fort Wayne stock, for the interview was in April, 1868, and at that time no other loan than the treasury notes had been made. The 5-20 bonds were not loaned until July 8, 1868, and the Fort Wayne stock until March, 1869.

I have referred to all the testimony bearing upon the question of Peterson's actual knowledge, and it entirely fails to show he knew of the use of the trust property, except the treasury notes, which as before stated, were loaned in February, 1867, when the special partnership actually existed, and hence no liability was imposed upon Peterson for these, and the knowledge even of their use was not imparted to him until April, 1868. In any event, they were returned to Strong, June 19, 1868.

The question yet remains, should Peterson have known of the use of the trust property? that is, was it his duty to know?

If it was, he is nevertheless liable.

In answering this, however, the relation that he and his partners imagined he occupied to the firm of Gould, Strong & Co. is all important, and the evidence is clear, that all of them regarded him as a special partner only.

Whether we treat him as general or special partner, by the very terms of the partnership articles, while he had a right to examine the books, it was no part of his duty to do so. Indeed, there seems to have been no occasion for him to do it, as his general partners sent him a statement monthly, purporting to be from the books.

It should also be borne in mind that Peterson resided and did business in this city—visited Gould, Strong & Co. but once in two or three months, and that, as already stated, it was expressly stipulated in the partnership articles, that he should not "transact any business on account of the partnership, nor be employed for that purpose as agent, attorney or otherwise."

With this positive injunction against his participation in the business in any way, and his non-intercourse with Gould, Strong & Co., he was clearly shut out from the ordinary sources of information open to a partner, and to hold under such circumstances that he was bound to know what Gould, Strong and White did, would give presumption a potency more powerful than the most positive testimony. Indeed, the embezzlement of the property and its use being criminal, the presumption, until overcome by evidence, is the other way.

Even had Peterson seen the books, they would have shed no light, for

in turning to the account with Strong, as executors, they impart not a glimmer indicating loan of money, bonds or stocks. It shows the purchase and sale of bonds and stocks, and the collection of interest and coupons. These, however, were transactions in the ordinary course of their business, as established by the partnership, and could not be notice to any one of illegal dealing in trust property or money. The testimony shows that in February, 1867, the treasury notes were loaned, July 8, 1868, \$15,000, 5-20; July 14, 1868, \$13,000, 5-20; July 30, 1868, \$3000, 5-20; March 30, 1869, 100 shares of the Fort Wayne stock; July 3, 1869, 200 shares; August 30, 1869, 142 shares, and September 3, 1869, 71 shares. Here are loans of the trust property on eight occasions, and not one of them is put in the account, although an account is regularly kept with Strong as executor. In striking contrast with this, we have the fact that every transaction which Gould, Strong & Co. had with Gould as executor in the usual course of the firm business is to be found in the account. Hence, it would seem but one conclusion can rationally be deduced from the omission of the trust property from the account, and that is, that Gould, Strong and White either did not regard those loans as transactions within the scope of the partnership, and hence omitted them, or omitted them for the purpose of concealing them from Peterson, should he inspect the books. Either alternative shows an intended fraud on Peterson.

In any event as between the partners and their privies, the partnership articles bind them precisely as they made them.

They are and were from the beginning, familiar with their minutest details, and have not the immunity given to one dealing on the faith of the firm, without knowledge of the restrictive provisions in the articles. And as the plaintiffs have shown no contract relation with the firm of Gould, Strong & Co., they cannot invoke the equity of an innocent party dealing with it, and must stand, if at all, upon Strong's part in the premises, and thus make him their agent; such a relation by legal implication, as potent as the implication of agency in a partnership which binds one partner for what another does, puts upon the plaintiffs as principals, the information springing from Strong's knowledge of the restrictions of the partnership articles. *Groves vs. Donaldson*, 3 H. 128; *Danville Bridge Co. vs. Pomroy*, Id. 151; *Story on Agency*, sec. 140; *Lycoming Fire Insurance Co. vs. The South Erie Iron Works*, 31 Legal Intelligencer, 404.

These restrictions limit Peterson's liability in any event to the \$20,000 he originally put in the firm, and knowledge of them also precludes a recovery for the money lost in the prohibited speculations.

Yeager vs. Wallace, 7 P. F. Smith, 365; *Hastings vs. Hopkinson*, 28 Vermont, 115; *Batty vs. McCrendil*, 3 Carr. & P. 204; *Dow vs. Sayward*, 12 N. H. 275; *Parsons' Part.* 93.

The evidence then failing to connect Peterson in act or knowledge with the fraud, the case exhibits this aspect.

The indifference of Shepherd shows his extreme negligence in making no effort for three or four years to discover what his coexecutors were doing with his testator's property committed to their joint trust. And Strong is grossly criminal in embezzling the property which he should sacredly guard against all comers. Yet here they are, the one covered

over with negligence, the other with crime, seeking a recovery of the only innocent party in the transaction, of \$90,000 lost to their testator's estate by their negligence and crime.

It is sought to break the force of this presentment, by showing that the action here is in the interest of the testator's estate, that the legatees are innocent, and had no knowledge of Strong's abstraction of the property. But surely their innocence gives them no right of recovery against Peterson, who is equally innocent. While the evidence entirely fails to involve Peterson in the fraud, it clearly establishes the liability of Gould, Strong and White, and Shepherd, against whom no steps have been taken to recover of them for their negligence and crime, and a recovery of Peterson would shut out recourse against them for the bonds and stock.

In view of such a result, it looks very much as if it were intended to relieve them if the money could be otherwise made. To permit the parties directly inculpated thus to escape would put negligence and crime at a premium, and honesty at a discount.

Such an aspect viewed in its most favorable light, has an ugly and suspicious look, and should receive no special favor or encouragement in a court of justice.

Great as is the wrong that these legatees have sustained, we must not forget that as between them and Peterson, his is the superior equity, for their testator by committing the bonds and stock to the custody of Strong and Shepherd, armed them with the power to so use them, that even Peterson could not know they were trust property, and thereby protect himself, as he might, had he been possessed of such knowledge, by forcing the return of the property to the trust estate. It will not now do, that the property is lost by the perfidy of their agent, to hold Peterson answerable, when he in turn has no means of indemnity over.

In such a case, that equitable rule of natural justice applies with great force, that when one of two innocent parties shall lose by the wrong of a third, he shall bear the loss, who has, though innocently, clothed the wrong-doer with the means to perpetuate the wrong.

To hold Peterson now liable, would convert him into an involuntary surety to plaintiffs that their testator's executors should properly discharge the duties of the trust, when Haven, in fact, committed his entire estate to their custody without security at all.

Recourse, nevertheless, is yet open to plaintiffs as against Gould, Strong and White, for their participation in the embezzlement, and against Shepherd for his negligence in not protecting the property from the criminal grasp of these men. There would, indeed, be great merit in calling these parties to account, as by their wrong-doing the property has been lost.

It is true there is no evidence to fasten knowledge of the use of the trust property on Shepherd, except, perhaps, the inference deducible from his negligence in not ascertaining what Strong was doing with the property when it was his duty to know, yet the evidence is clear and convincing, that by the provisions of Haven's will, it was his duty to see that the property was securely invested in trust. Had Shepherd done this, it would yet be safe to plaintiffs, as in such case it could not be lifted from the trust estate without his joining in the transfer. Instead of

discharging his duty in this plain and simple way, he permitted Strong to use the property for three or four years as his own, and ultimately to lose it. This neglect clearly points to Shepherd's liability; and as there is no evidence to show that he is not able to make good the loss, it may yet be, that the plaintiffs may obtain justice by a recovery from those who have directly caused the injury.

As viewed from every point, the court is of opinion, that the judgment of nonsuit was properly entered, and we accordingly discharge the rule to take it off.

Rule discharged.

R. H. McGrath and V. Guillou, Esqs., for plaintiffs.

D. W. Sellers and I. S. Sharpe, Esqs., for defendant.

[Leg. Int., Vol. 31, p. 196.]

BROCK vs. RICHARDSON.

A new trial will not be granted on the ground of absence of counsel at the trial, unless it is shown clearly that a different aspect would have been presented if counsel had been present.

Rule for a new trial. Opinion delivered *June 13, 1874*, by

BRIGGS, J.—The defendant moves for a new trial, upon the ground that the case was tried during the absence of his counsel. While this is true, it is also true, that neither the defendant, nor any witness for him, was present at the trial. Hence, the only advantage he could derive from his counsel's presence, was what could have been gleaned from the only witness examined, by a cross-examination of that witness. While the defendant has laid before us his own deposition, and also that of another, he has failed to produce the deposition, in the form of a cross-examination, of the witness examined by the plaintiff, and upon whose testimony the verdict was obtained.

This he should have done if he intended to show that a different result would have been reached had his counsel been present. Having failed to do this, when it could as readily have been done as to produce the other depositions, such failure must be construed to the end, that the witness, if cross-examined, would not have affected his testimony as given at the trial.

Viewed in this light, the defendant lost nothing by his counsel's absence.

After a case has been duly reached and tried, we cannot give to depositions taken after the trial, the effect the same testimony would be entitled to if given at the trial, without it being shown to us why the witnesses were not then present.

No reason for their absence being shown us, the rule is discharged.

Richard P. White, Esq., for plaintiff.

Samuel Dickson, Esq., for defendant.

[Leg. Int., Vol. 31, p. 196.]

PROWATTAIN vs. TOWNSEND.

A new trial will not be granted on ground of counsel's absence, unless there be some evidence of merits presented.

Opinion delivered *June 13, 1874*, by

BRIGGS, J.—The same grounds set out in the foregoing opinion apply

to this case. While the court recognize the difficulties of counsel engaged in practice in a city like this, and are therefore lenient to excuses for occasional unavoidable absence when cases are called, yet justice to suitors requires that a verdict obtained even in such a trial should not be set aside without some evidence of merits in the case to enable the court to see that a different result might have been produced had the party or his counsel been present.

No such evidence has been presented in the depositions in this case, and we must therefore adhere to the usual course of practice and discharge the rule.

Theo. F. Jenkins, Thos. R. Elcock, and E. S. Miller, Esqs., for plaintiff.
Boyer and Geo. Biddle, Esqs., for defendant.

[Leg. Int., Vol. 31, p. 196.]

KANE vs. THE RESERVE MUTUAL LIFE INSURANCE COMPANY.

The relation of FATHER and SON is sufficient to establish an insurable interest in the life of the father.

Rule for a new trial. Opinion delivered *June 13, 1874*, by

BRIGGS, J.—This action is upon a policy of insurance on the life of John Kane, in the sum of \$2000, issued by the defendants on the first day of April, 1872, in favor of the plaintiff, who is a son of John Kane.

John Kane labored daily to support himself and family. He died June 26, 1872, at the age of fifty-five, leaving surviving him a widow and three minor children. At the time of his death the plaintiff was about thirty years old. The plaintiff paid \$150 to bring John Kane and his family from Ireland to this country, and the further sum of \$50 in household furniture, to enable him to commence housekeeping here.

Of these sums the plaintiff has been reimbursed about \$50.

The defendant offered no testimony, but requested me to instruct the jury as follows:

"1. If the jury find from the evidence that the plaintiff was, at the execution of the policy of life insurance, an adult son of John Kane, then, as such, he had no insurable interest in his father's life, and the verdict should be for the defendant.

"2. If the jury believe from the evidence, the plaintiff represented at the time of the application, that he had an insurable interest in the life of John Kane, it is incumbent on him to show he had such interest, and if he has failed to do so the verdict must be for the defendant.

"3. The plaintiff as a creditor can only recover in this case the amount of his outlay on behalf of his father."

I declined to so instruct the jury, and told them to find a verdict for the plaintiff.

Had the plaintiff such an interest in his father's life as constituted a legal consideration for the policy? He certainly was interested in the life of his father, that he might maintain his mother and her minor children, who, upon John Kane's death, might become a charge upon the plaintiff, and who, from the tie of blood, would, at least, be morally bound to maintain them, rather than see them want, or become a public charge.

While such a consideration might not impel a stranger thus to act, yet

for the plaintiff to refuse to do so, would be unnatural and inhuman. This dependence of the father's family upon the plaintiff, upon the contingency of his father's death, is certainly a meritorious consideration, and in no aspect can it be said to be an illegal one.

It may be asked, if the defendants did not regard such an interest as insurable, why did they take from the plaintiff a premium for insuring it?

By this act, it seems to us, they have estopped themselves from averring such interest was not insurable, unless they were prepared to show the policy was issued upon some other interest than mere blood-relation between the father and son.

We think the plaintiff's relation to John Kane, in view of the liability of the family of the latter, to become a charge upon the former, upon the death of John Kane, raised and supported an insurable interest. This view seems to be supported by the language of the court in *Loomis vs. The Eagle Life and Health Insurance Co.*, 6 Gray, 399, in these words:

"We cannot doubt that a parent has an interest in the life of a child, and, *vice versa*, the child in the life of a parent, not merely on the ground of a provision of a law, that parents and grandparents are bound to support their lineal kindred, when they may stand in need of relief, but upon considerations of strong morals, and the force of natural affection between near kindred, operating often more efficaciously than those of positive law."

The same court, in *Forbes vs. The American Mutual Life Insurance Co.*, 15 Gray, 254, said: "As the premium is intended to be the precise equivalent for the risk taken, it would seem that the contract is a just and equitable one, whether any interest exists in the life or not; and the only essential inquiry is, whether the object of the contract is such as to obviate the objection to a mere wager upon the chances of human life."

In construing a contract meritorious in itself, we should, if possible, sustain it because of its merit, just as the parties voluntarily bound themselves to it, upon such a consideration, rather than become astute in our researches to find technical reasons for avoiding it.

The defendants in taking the premium for this insurance, certainly did not regard the contract as of a wagering character, as they could not do so without deliberately becoming a party to the illegal transaction, and that too, merely for the sake of the premium received—a result not at all to be presumed. And unless the insurance can be avoided upon the ground, that it was a mere wager upon the life of John Kane, it must be sustained, because the interest which the plaintiff had in the life of his father was an insurable interest.

These views dispose of the defendant's first point, and also of the third point, for, if the interest was insurable, the policy was good for the full amount, independent of the debtor and creditor relation between the father and son involved in the third point.

There was no evidence to warrant the affirmance of the second point. Rule discharged.

D. C. Harrington, Esq., for plaintiff.

H. M. Dechert, Esq., for defendant.

[Leg. Int., Vol. 31, p. 196.]

MARKLEY vs. WARTMAN et ux.

The husband is liable for necessities furnished to the wife for the support of herself and family, although she has been decreed a *feme sole* trader.

Plaintiff declared against husband and wife for coal furnished to the wife, averring that the coal was necessary for the support of the family of the husband and wife. To this the husband pleaded that the wife "is a *feme sole* trader, so declared by the decree of the Court of Common Pleas, etc., and that this defendant is not liable for any debts incurred by her." The plaintiff demurred to this plea.

Opinion delivered June 13, 1874, by

MITCHELL, J.—It might be sufficient to say that the plea is defective in form, in not setting out that the wife was a *feme sole* trader at the time of contracting the debt, but we are clear that it is bad in substance, and therefore dispose of the case upon that ground.

At common law, the husband, and he alone, was liable for the support of the family, and this liability extended to all necessities furnished to the wife for that purpose. By the express words of the act of April 11, 1848, sec. 8, where debts are contracted for necessities for the support of the family of any married woman, the creditor may sue both husband and wife, and after exhausting the husband's estate, he may have execution of the wife's. The plaintiff by his declaration has brought himself clearly within this act.

We are unable to discover anything in the acts of 1718 and 1855, relative to *feme sole* traders, that shows any legislative intent, to change in their case, the common law rule, so carefully preserved in the act of 1849. On the contrary, the act of 1718 expressly provides, that where it is made to appear to the court in which any execution is returnable, that the wife, acting as a *feme sole* trader, has "laid out money for the necessary support and maintenance of herself and children, in such case, execution shall be levied upon the estate of such husband, to the value so paid or laid out." And again, in section 3, if the husband remain absent so long, that his wife and children "are like to become chargeable to the town," then the estate of such husband shall be liable to be taken in execution to satisfy any sums the wife or guardian shall necessarily expend for their support and maintenance.

The act of 1855 makes no change in the respective liabilities of husband and wife; it merely extends the operation of the act of 1718 to other cases than that of absence of the husband at sea, and refers for the privileges and liabilities of a *feme sole* trader to that act. 20 P. F. Smith, 498.

We think it is clear, therefore, from the rule of the common law, and the plain legislative intent of every act on the subject, that the primary liability for necessities for the support of the wife and family is upon the husband, whether the wife be entitled to the privileges of a *feme sole* trader or not.

These privileges are for her assistance and protection, not for his who has disregarded his natural and legal duty, and sought to escape his just burdens.

The precise point involved in this case does not appear to have been

decided by the Supreme Court, but it is necessarily involved in the decision of the converse proposition, that the wife is not primarily liable, made by this court in *Sheetz vs. Cleaver*, 8 Phila. 3, affirmed by the Supreme Court in 20 Smith, 496.

Judgment for the plaintiff on the demurrer.

Henry C. Titus, Esq., for plaintiff.

L. R. Fletcher, Esq., for defendant.

[Leg. Int., Vol. 32, p. 117.]

ARTMAN et al. vs. BELL.

In a proceeding on a warrant of arrest under the act of 1842, if there is a doubt of defendant's fraud, it is to go in his favor.

Fraud is not to be presumed from the incorrectness of a defendant's expressed *estimate* of the value of his property.

A composition between debtor and creditor shows a ratification of the sale of goods.

An assignment for creditors is persuasive evidence that the assigned property was not bought with fraudulent intent.

Proceeding on a warrant of arrest under the 3d section of the act of 12th July, 1842.

Opinion delivered *December 26, 1874*, by

BRIGGS, J.—I shall discharge the defendant for the reason that the act of 1842, abolishing imprisonment for debt, is an act passed in favor of liberty, and no citizen, since the passage of that act, can be held responsible for debts so far as his liberty is concerned, unless the case can be made out so clear as to point in the direction of fraud, and in such a case the facts and circumstances ought to leave no doubt of the fraud on the mind of the judge; and the very fact that there is a doubt, would be sufficient to warrant the discharge of the defendant, as the doubt would be in favor of liberty.

This is a case of alleged fraud growing out of a contract for the purpose of obtaining possession of property. If the fraud is clear, and the party gets away with the property, or he gets it when he ought not to have it, of course he is to be held for the fraud, and under this act is to be thrown into prison or held to execute his bond for the purpose of taking the benefit of the insolvent laws. The defendant here stated that he owed some five thousand dollars on account of his stock. Parties and business men generally must not, in their desire to drive a bargain, omit to do that which common prudence would require and then come into court to expect a judge, under the compulsory process of the law, to help them out. That is never to be done. In regard to the judgments which have been spoken of by the counsel for the plaintiff, it could have been just as readily asked at the time the purchase of the goods was made, "are there any judgments against you that bind your property? if so, how many, and what are their amounts?" A few inquiries of that kind, carefully followed up, would have resulted to a mathematical certainty, in the probable balance there would have been in the defendant's hands as an available asset for the purpose of meeting the payment of these goods. The inquiries were, however, confined to the stock of goods on hand, and the amount of indebtedness on the stock, and the defendant said that he owed about five or six thousand dollars on his stock of merchandise. But the statement which he made as to his indebtedness was but an estimate, and the parties so regarded it. In the very nature

of things they must so regard it until there is a calculation made whereby the exact amount of indebtedness is fixed. This statement can be regarded as neither more nor less than defendant's idea of his indebtedness, and the plaintiffs could not be deceived in that particular, unless it was absolutely reduced to a certainty that a misstatement had been made after an account taken. They were dealing in probabilities. Any estimate must be taken with many considerations of allowance, and the difference between six thousand dollars and ten thousand dollars is not so great as to presume fraud, where the amount given is an estimated one, especially in view of the evidence referring to his other property.

But there is another feature in this case which is very important. The parties came together for the purpose of executing a composition deed, and though it did not go through, another agreement was made which was outside of it, and directly between the parties before me here to-day, and not between the plaintiffs and creditors generally, and the defendant as a debtor. The agreement made was unknown to the other creditors, and as far as other creditors are concerned, it has been stamped by the law as fraudulent, and hence void. If it were otherwise, it would put it in the power of one creditor, when a man is insolvent, to enter into a private agreement with him, with a reservation that he was to be paid dollar for dollar, or have an advantage over the other creditors. And though that cannot be done, it shows a ratification of the sale of the goods as between the parties to the agreement. While creditors might avoid it, the parties to it cannot.

Independent of that transaction, however, the defendant made an assignment for the benefit of his creditors, and the very property that he obtained in this alleged fraudulent purchase he turned over to his creditors, and this action repudiates the thought that he obtained the property for the purpose of fraud. If he did obtain it for a fraudulent purpose, why should he turn the same property over for the benefit of other people?

I therefore think that there has been no case of fraud made out against the defendant, and hence order his discharge.

J. M. Moyer, Esq., for plaintiffs.

Earle and White, for defendant.

Supreme Court at Nisi Prius.

[Leg. Int., Vol. 29, p. 4.]

MAIN vs. BAYARD.

Replication in confession and avoidance is bad.

Demurrer to replication. Opinion delivered *December 30, 1871*, by SHARSWOOD, J.—It was decided in this case by Chief Justice Thompson at Nisi Prius, that these special pleas were good, and I am certainly not at liberty to review that decision here. *Main vs. Bayard*, 7 Phila. Rep. 616. The second and third pleas are in the form of special traverses, setting up an answer to the declaration by an inducement with a traverse of the material part of the count under an *absque hoc*. If this inducement shows a defence, and the traverse under the *absque hoc* is not to an immaterial point, the established rule is, that the inducement can neither be directly traversed nor answered by new matter in confession and avoidance. Steph. on Pl. 136. The replications to these pleas here do plead to the inducement matter in confession and avoidance, and are therefore in violation of this rule. The fourth plea is not a special traverse, but perhaps is to be regarded as in confession and avoidance. The plaintiff undertakes to answer it by way of special traverse, but I think the inducement is insufficient in law as a reply to the last pleading. The plea sets up a felonious robbery: the inducement admits the robbery, but avers that the goods lost were not properly taken charge of, watched and guarded by the defendant, without averring that the loss by the robbery was in consequence of such want of care. I cannot for myself perceive any advantage to be gained in this case by this special pleading: no question of law is likely to be raised on the record, and it is not pretended that any part of it cannot be given in evidence under the general issue.

Plaintiffs have leave to amend their replications.

S. C. Perkins, Esq., for plaintiff.

C. B. Penrose, Esq., for defendant.

[Leg. Int., Vol. 29, p. 4.]

ELLIS vs. IMPERIAL FIRE INSURANCE COMPANY.

A conclusion of plea by a verification erroneous, where new matter is not introduced.

Demurrer to plea. Opinion delivered *December 30, 1871*, by SHARSWOOD, J.—The first plea is clearly bad for duplicity, and the demurrer thereto is sustained.

The second and third pleas are also bad because they conclude by a verification instead of to the country. It is sometimes a very nice point to determine. The general rule is, that upon a negative and affirmative the pleading shall conclude to the country, but that when new matter is introduced, with a verification. Steph. on Pl. 233. There is a very learned note by Sergeant Williams to *Hayman vs. Gerrard*,

1 Saund. 103, note 1, which shows how difficult it is sometimes to decide what is new matter; for he cites a case of *Fearon vs. Pearson*, where to debt on bond conditioned to account for fees received, the defendant pleaded general performance, to which plaintiff replied, setting out a breach that defendant had received a certain amount of fees which he had not paid over; the defendant rejoined that the plaintiff had appointed A. B. to receive the fees, and that he had paid all the fees received to the said A. B., and concluded with an averment; and it was held good, because the appointment of A. B. to receive the fees was new matter. However, in the present case, the narr sets out the memorandum, indorsed on the policy, and avers specially that the property was situate in accordance with the said memorandum—a traverse of the facts thus averred presents the case of a simple affirmative and negative, and is not the introduction of any new matter. The pleas, therefore, should have concluded to the country.

The defendant has leave to amend.

Thomas Hart, Jr., for plaintiff.

John Samuels, Esq., for defendant.

[Leg. Int., Vol. 29, p. 12.]

MCCALLION vs. GEGAN.

An action of trespass *quare clausum fregit* survives death of defendant, and a *sci. fa.* may issue against his legal representatives.

Demurrer to plea. Opinion delivered December 30, 1871, by SHARSWOOD, J.—This was an action of trespass *quare clausum fregit*, brought against Gegan and two others. Gegan pleaded “not guilty;” whether it was at issue as to the other defendants does not appear on the papers submitted to me. Gegan died and his death was suggested. Thereupon a *scire facias* issued to bring in his executor, who appeared and pleaded specially that he ought not to answer to the action, “because the same is not such a cause of action as by law will survive against this defendant, as the legal representative of the said John Gegan, deceased.” To this plea there is a general demurrer. I do not stop to inquire whether the executors of a deceased party can be sued jointly with co-trespassers. That point is not here made, and it may be, does not arise on this demurrer. The question of misjoinder is perhaps an open one, to be taken advantage of hereafter. We have to consider the mere question, whether trespass *quare clausum fregit* is a cause of action which survives against executors and administrators. At common law it undoubtedly did not. It is a personal action, and the rule was, *actio personalis moritur cum persona*. *Nicholson vs. Elton*, 13 S. & R. 415. The 28th section of the act of February 24, 1834, Pamph. L., p. 78, provided that “executors or administrators shall have power to commence and prosecute all personal actions which this decedent, whom they represent, might have commenced and prosecuted, except actions for slander, for libels, and for wrongs done to the person, and they shall be liable to be sued in any action, except as aforesaid, which might have been maintained against such decedent if he had lived.” And the 27th section of the same act also provides, that whenever the cause of actions doth by law survive, the executors or administrators of any such party to a pending suit

dying, may be proceeded against by *scire facias*, and made parties thereto. Why any further legislation was needed to meet the case I am at a loss just now to perceive, but by the Act of April 12, 1869, Pamphlet Laws, 27, it is expressly enacted, "that no action or right of action for mesne profits or for trespass against property, real or personal, shall abate by reason of the death of the person liable therefor, but suit may be brought and recovery had against the personal representatives of such deceased person; and if such death occur after suit brought, the personal representatives may be substituted for the decedent, and said suit prosecuted to judgment, and the estate of such deceased person shall be liable to the same extent as if he were living." Upon this state of the law, then, this plea must be adjudged bad.

Judgment for plaintiff that John Maher, executor of the last will and testament of John Gegan, deceased, be and he is hereby made a party defendant to said action.

L. Hirst, Esq., for plaintiff.

William Ernst, Esq., for defendant.

[Leg. Int., Vol. 29, p. 5.]

JOHNSON *vs.* WEBER.

Demurrer to *all* the counts of a declaration, where one only is defective, overruled.

Demurrer to declaration. Opinion delivered *December 30, 1871*, by

SHARSWOOD, J.—The declaration contains several counts. First, a special count in which the plaintiffs declare as insurance brokers and average adjusters upon a loss by stranding, for contribution by the defendants as owners of goods on board which were saved. Secondly, this is followed by a count for work and labor and the common money counts. To this there is a general demurrer, not to the first count, which I am inclined to think cannot be sustained, but to the whole declaration. There is, I suppose, no rule in pleading, better settled than that if a demurrer be too large (as it is called), that is, be pointed to all the counts of the declaration in a case where one of them only is defective, the court will give judgment for the plaintiff generally, notwithstanding the defective count. Steph. on Pl. 145. As no doubt the general and money counts in this case are entirely formal and perfect, the result must be that this demurrer is overruled.

Demurrer overruled, and defendant has leave to withdraw it and plead.

S. C. Perkins, Esq., for plaintiff.

Thomas J. Diehl, Esq., for defendant.

[Leg. Int., Vol. 29, p. 5.]

BURNHAM *vs.* LUNING *et al.*

Under the word "freemen" in the constitution of Pennsylvania, Article III., sec. 1, the right of voting is confined to citizens of the male sex.

Demurrer to declaration. Opinion delivered *December 30, 1871*, by

SHARSWOOD, J.—The plaintiff, a woman, declares against the defendants, the election officers of the eleventh election division of the four-

teenth ward of the city of Philadelphia, for refusing her vote at the general election, held on the 10th day of October, 1871, averring that she was duly qualified in all respects according to the constitution and laws of this Commonwealth. The defendants demur and assign among other causes of demurrer that the declaration shows that the plaintiff is not a freeman in the sense in which that word is used in the constitution: Article III., section 1.

It is beyond all question, that the provisions of the ninth article of the constitution, commonly called the Declaration of Rights, extend to and include both sexes, and that when the word "man" or "men" are therein used, they comprehend also women. It is equally clear that a woman who is born in this country, or naturalized, as she may be under the acts of Congress, is a citizen as fully entitled to the protection of the government as a man, and with a right fully to enjoy all the privileges which properly belong to citizens. But it does not follow that the election franchise is one of these privileges. That is exclusively regulated by the constitution, which has excluded many citizens from it by reason of age, non-payment of taxes, non-residence within the Commonwealth and election district for a certain period of time. Nor can I perceive that the fourteenth and fifteenth amendments to the constitution of the United States have any bearing or application upon the question. The third article, section 1, of the constitution of Pennsylvania, does not, in this respect, at least, abridge the privileges or immunities of citizens of the United States, for the elective franchise is not one of them, nor is the right of the plaintiff to vote denied or abridged, on "account of race, color, or previous condition of servitude."

We are reduced, then, to the simple inquiry, whether the word "freeman" in Art. III., sec. 1, constitution of Pennsylvania, was intended to confine the right of voting to citizens of the male sex? This section, so far as the matter in hand is concerned, is, in effect, copied from the constitution of 1790, and that followed also the constitution of 1776. In the latter, Chap. II.; sec. 6, it is provided: "Every freeman, of the full age of twenty-one years, having resided in this State for the space of one whole year next before the day of election for representatives, and paid public taxes during that time, shall enjoy the right of an elector, provided always, that sons of freeholders of the age of twenty-one years shall be entitled to vote, although they have not paid taxes." The constitution of 1790 had also a similar proviso, showing clearly that by "freeman" only a male was intended. For surely, had it not been so, the daughters, as well as the sons, of freeholders, or of qualified electors, would have been included.

When the meaning of this word "freeman" is thus clearly ascertained from the language of the constitutions of 1776 and 1790, there can be no doubt that it ought to have the same meaning in the amended constitution of 1839, although the proviso is not expressed in the same form—not being confined to the sons of qualified electors, but to all freemen between the ages of twenty-one and twenty-two. There is only one other clause of the constitution in which this word "freeman" is used, and there it is most unquestionably confined to males. Article VI., sec. 2, declares, that "the freemen of this Commonwealth shall be armed, organized and disciplined for its defence, when and in such manner as may

be directed by law." It is clear that the constitution contemplates that the same class of persons who do the voting shall also do the fighting. The corresponding clause in the constitution of 1776 is still clearer and more emphatic. "The freemen of this Commonwealth and their sons shall be trained and armed for its defence:" Chap. II., section 5.

The uniform construction of the provincial constitutions and charters in which the same word is employed, as well as under the constitutions since the revolution, has been in accordance with the doctrine that none but males have the right to vote. *Contemporanea expositio est optima et fortissima in lege*. In the *Commonwealth vs. North et al.*, 3 Hazard's Reg. 228, the Supreme Court of this State decided, when the charter of a church gave the right to vote to members generally, that the fact that for twenty-five years the females of the church had not voted was conclusive, Chief Justice Gibson remarking, "There is no safer exposition of what was intended by such an instrument than usage. We can say that we have in Pennsylvania a uniform and uninterrupted usage of nearly two hundred years, showing that women were never intended to possess the elective franchise. Such a usage ought to settle the construction, even if the words of the constitution were more general and comprehensive than we have seen them to be."

Judgment for the defendant.

Damon Y. Kilgore, Esq., for plaintiff.

Robert H. Hinckley, Jr., Esq., for defendants.

[*Leg. Int.*, Vol. 29, p. 12.]

McNICKLE vs. HENRY.

1. A guardian, as long as he remains the rightful bailiff of the property, is entitled to reasonable allowances as a trustee.
2. A trustee should keep up insurances which were on the property when it came into his hands.

Plaintiff filed a bill in equity in the Supreme Court asking to have her dower assigned and set out to her, and also a decree for an account of the rents and profits received by the defendant since the husband's death.

Justice Sharswood, last February (8 Philadelphia Reports, 87), held that the Supreme Court, as a court of equity, since the act of April 20, 1869, P. L. 77, has not jurisdiction to award an inquest to make partition and to value the widow's interest; but that the widow was entitled to an account, and it was re-referred to the master, John Samuel, Esq., to state one.

The following is an extract from his report on the interesting question, whether the amounts paid by the defendant for insurance of the premises should be allowed:

"Cash paid for insurances. These are three items amounting to two hundred and forty dollars, paid for keeping alive insurance which had been effected by testator in his lifetime on a building and machinery, situated 605 St. Mary street, used by him as a distillery. It may be true that an insurance on real estate effected by a decedent would, in equity, enure, in case of loss after his death, to those who would have an interest in the real estate insured. *Parry vs. Ashley*, 3 Sim. 97; *Haxall vs. Shippen*, 10 Leigh, 136; *Wyman vs. Wyman*, 26 N. Y. Rep. 253; *Campbell vs. Murphy*, 2 Jones' Eq. 357. But this is not the case of an

insurance made by decedent: that being limited would have expired. This renewal is equivalent to a new insurance effected by defendant. A trustee is not bound to insure (*Fry vs. Fry*, 27 Beav. 146), and Mr. Lewin says, "where there is a tenant for life, ought not to be advised to insure out of the income without the consent of the tenant for life." Lewin on Trusts, page 383. It would be strange if the owner of real estate be obliged to have it insured whether she will or not. Therefore, while we may doubt whether either complainant or defendant would have taken the position they now assume had the premises insured been destroyed by fire, yet as the widow never consented, this outlay cannot be forced on her, and the credits therefor are disallowed."

Sur exceptions to master's report.

Opinion delivered December 30, 1871, by

SHARSWOOD, J.—I cannot agree with the learned master in the principles upon which he has settled this account. By the act of April 20, 1869, Pamph. L. 77, the widow has as much right as the guardian to institute proceedings in partition, and it was no more his duty than it was hers. If the estate under such proceedings would eventually have to go to a sale, it might be very much to the interest of all parties to postpone the proceeding. The guardian of the minor heirs remained, therefore, the rightful bailiff of the property, down to the time when the final decree was made in the partition writ in the Orphans' Court. He had a perfect right to resist the bill in equity for an assignment of the dower by metes and bounds, if in law, as we must now assume, the court had no jurisdiction. He is entitled then to all such reasonable allowance as any other trustee would be, down to the close of his relation to the property.

As to the particular items, it appears to me, that the defendant was entitled to credit for the premiums annually paid to keep up the insurances which had been effected by the decedent in his lifetime. I am inclined to the opinion, notwithstanding a dictum to the contrary in Lewin on Trusts, 383, and the case of *Fry vs. Fry*, 27 Beav. 146, cited and relied on by the master, that a trustee is bound to insure, especially to keep up insurances which had been effected and were on the property when it came into his hands. It is conceded that if there had been a loss it would have inured to the plaintiff, and I think it probable, as did the master, that if the premises had been destroyed by fire, we should not have heard of this objection from the plaintiff. As to the other items, I agree with the master, except as before mentioned, as to the limit of time he has fixed.

Exceptions sustained except seventh and eighth, and case recommitted to the master to report an account conformably hereto.

Hon. A. V. Parsons, for plaintiff.

E. C. Quin and Edward Olmstead, Esqs., for defendant.

[Leg. Int., Vol. 29, p. 100.]

THE GERMAN SOCIETY FOR THE RELIEF OF DISTRESSED GERMANS,
ETC., vs. THE CITY OF PHILADELPHIA.

Where a lease provided that the tenants, the city, should pay all taxes, and afterwards the Legislature exempted the property from taxation, as long as used for charitable purposes: *Held*, that the city were still liable to pay the amount of the taxes to the landlord; the act being passed for the benefit of the charitable society and not for the city.

In equity. Demurrer.

The question before the court was to determine who received the benefit of the act exempting the hall of the German Society from taxation, the gas trust—the tenants—refusing to pay, and the city solicitor defending their action, while the German Society, one of the most useful charities in the city, claim the Legislature meant to give them the benefit. The gas trust originally agreed to pay a certain rent and the taxes for the room occupied by them in the hall of the German Society. Afterwards, the members of the trust accepted the proposal of the German Society to have the taxes paid to the society under the usual exemption law. The act was passed, but the gas trust refused to carry out the agreement. The German Society filed a bill in equity to test their rights, and the city solicitor put in a demurrer. The whole case was fully argued on both sides, and reserved by the court for decision at a future day.

Opinion delivered March 18, 1872, by

AGNEW, J.—This is a general demurrer to the plaintiff's bill, and, therefore, admits all the facts well charged. It is necessary, in order to dispose of the case, to ascertain these admitted facts. The first fact is the lease from the plaintiff to the city in trust for the gas works. The lease is expressed to be made *in consideration* of the rent and the *covenants to be performed* by the city. One of the covenants is, that the city "shall pay the city and State taxes on the whole of said premises during the term of this lease." Thus it is obvious that payment of the taxes is a part of the *redditus* or return to be made for the property, for it is a part of the consideration of the demise. Next it is admitted that, before the passage of the exempting act, the members of the gas trust were invited to meet the president and officers of the German Society, to consult upon the propriety of procuring exemption of the property from taxation "for the purpose of adding the sum paid in taxes to their income for charitable expenditures;" and that this suggestion was adopted. The meeting was held, at which the gas trust members, through one of their number speaking for the body, agreed that the taxes should go to the society. It is averred, also, in the sixth section, that a majority of the members of the gas trust agreed to the plan of having the property exempt from taxation, and of paying to the society the amount of such taxes. In consequence of these proceedings, it is averred that the act of assembly was passed to confer the benefit of the exemption upon the German Society for charitable purposes, and the act is set forth in full. From these facts it seems to me the true question is, for whose benefit were the taxes released—the German Society, or the city? And then, how does this affect the contract of lease? Upon the question for whose benefit, the language of the act confirms the facts alleged, for it con-

cludes that the premises are "to continue to be so exempted, so long as the revenues received from such building are used for charitable purposes."

The intent of the law is clear; the taxes were released for the benefit of the charity, not of the city. The taxes were a part of the expressed consideration of the lease, and had the building been exempt from taxes when the lease was executed, the amount of the taxes would have been added to the rent in terms. This amount is, therefore, substantially a part of the rent. On what ground, then, can the city lay claim to the benefit of the exemption and retain this part of the *redditus*? The law does not in terms confer it on the city; the lease cannot be so construed; the admitted understanding of the parties preceding the application for the law is adverse to it, and the equities of the case forbid it. The German Society is one of the ancient institutions of the city, recognized by the Legislature as a most deserving charity, by the act of incorporation in the year 1781, the preamble setting forth its usefulness and the regard in which it was held. To its efforts to ameliorate the condition of the immigrant Germans, and to educate and benefit the resident population, the city owes a large debt. He whose memory runs back half a century has not forgotten that meritorious class of immigrants known as German Redemptioners, cared for and protected by law as a class of servants, too poor to pay in money for their passage across the sea, yet able and willing to pay for it in service. Many of them were valuable servants in the field, the workshop and the dwelling, and became respected citizens and useful members of society. The writer remembers them well, taken as they were even into the western parts of the State. To these and others this society lent its encouragement and aid. My conclusion, therefore, is, from the facts admitted by the demurrer, and the terms of the act itself, that the benefit of the exemption from taxation was conferred by the Legislature on the society in furtherance of its charitable purposes. How, then, is the contract of lease affected by this law? Clearly it is not impaired by it. The city or gas trust will have no more to pay than it did before, if the amount of taxes be transferred to the society. Its contract is to pay this sum in consideration of the demise. In carrying out in equity the intent of the law to confer the taxes upon the society for charitable uses, the destination of the money only is changed from one object to another, while the tenant pays no more, and has no interest whatever in the application of the fund, except that general advantage which the charity contributes to promote. It is argued the law cannot change the contract. It cannot *impair* the contract, I admit, but I deny that it is incompetent to give direction to the results of the contract—results in which the city has no interest to be impaired, but one rather to be promoted by the charity. The money the city is bound to pay.

Why shall the State, as the source of the power of taxation, not direct that the same sum to be paid as taxes, shall be distributed to charitable purposes by the hands of the plaintiff? *Actus legis nemini damnosus*—2 Inst. 287—"Act of the law doth wrong to no man"—Viners' Ab. 26. The effect, then, of this act exempting the demised premises from taxation so long as the revenues received from said building are used for charitable purposes, is that the taxes are converted into a revenue for these purposes. The State as the sovereign, having the legal right to

control these taxes, chooses to appropriate them to a different purpose. The city, as a municipal division of the State, is subject to this control, and must submit to this appropriation.

She pays no more money, but the destination of the money is merely changed. In equity, therefore, the society is entitled to subrogation to the municipality for the taxes, formerly devoted to municipal purposes, but now by law appropriated to a charity. I do not see how the city, as a municipal division absolutely subject to State control, can object to this.

I therefore overrule the demurrer, and order a decree against the city for the payment to the society of the sums which would have been payable to the city for municipal taxes for the years 1869, 1870 and 1871, with interest from the 16th of April in each year, and also for the future payment of the amount of taxes which would be chargeable to each year for municipal taxes at the current rate of taxation in each and every year hereafter (including 1872), on the 16th of April in each year, with leave to apply to the court for the appointment of a master to ascertain and report the sum, if the same cannot be settled and agreed upon by the parties, together with the costs of this proceeding to be paid by the city. Let a decree be drawn up and submitted in due form.

And now, March 23, 1872, the decree in the above case is so modified as to read: "And now, March 18, 1872, the demurrer is overruled, and the defendants are allowed to plead to, or answer the bill within thirty days."

J. G. Rosengarten and George Junkin, Esqs., for plaintiffs.

George D. Budd, Esq., for city.

[Leg. Int., Vol. 29, p. 101.]

THE LOCUST MOUNTAIN COAL AND IRON CO. vs. GORRELL *et al.*

The owner of an upper mine must use reasonable diligence to prevent the flow of water from his mine into a lower mine. The maxim *SIC UTERE TUO UT ALIENUM NON LÆDAS*, applies to such a case.

In equity. Motion to dissolve injunction. Opinion delivered *March 27, 1872*, by

AGNEW, J.—That underground rights cannot be exercised with exact regard to the rules which govern surface rights, must be admitted, for the consequences are not always visible, or capable of being prevented. In mining beneath the surface some things must happen, as it were accidentally, which are not the results of negligence or wilfulness. Hence, I am not disposed to deny the general rule as stated, by Cresswell, J., in *Smith vs. Kenrick*, 7 Manning, Grag. & Scott, 62 Eng. C. L., 564, that it would seem to be the natural right of each of the owners of two adjoining coal mines—neither being subject to any servitude to the other—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine so long as that does not arise from the negligent or malicious conduct of the party. But this is not to be accepted in too broad and unlimited a sense, nor be permitted to overturn the maxim *sic utere tuo ut alienum non lædas*,

in those matters where a proper attention to the rules of careful and ordinarily skilful mining would preserve the adjoining and even subjacent mine from damage. The case itself does not support the unlimited extent to which the argument for the defence seemed to carry the rule. During the argument in *Smith vs. Kenrick*, Maule, J., remarked: "Nobody suggests that an action will not lie for wrongfully turning water into another man's mine." In the opinion of Cresswell, J., also, it is admitted that a man may cause water to flow from his own premises into his neighbor's, so as to make himself liable to an action. Our cases of *McKnight vs. Ratcliff*, 8 Wright, 156; and *Douty vs. Bird*, 10 P. F. Smith, 48, seem to look in the same direction. The rule, therefore, is rather to be restricted, in relation to descending water, to that which finds its way into the subjacent mine, unintentionally, as it were, on part of the superjacent miner, where in the course of careful and proper mining in taking out his own coal, the water sinks below without negligence or malice on his part, even though in an increased quantity. In Bainbridge on Mines, chap. 10, sec. 3, Dallas' ed. p. 455, it is said the law is founded on the natural assumption that water is the common enemy, which, whether open or concealed, each owner must combat for himself; and upon another different, but consistent principle, that each owner has the full right to extract the greatest possible benefit from his property, and that, if, in so doing he injure his neighbor, he will not be liable to an action, if his acts spring from no malice or mischief, and are simply consistent with a reasonable exercise of his own rights. This is substantially the same rule stated by Cresswell, J., in *Smith vs. Kenrick*, and it is chiefly taken by Mr. Bainbridge from that case, in which the two controlling facts were, that the plaintiff had left no barrier in his own subjacent mine to keep out the water from above; and the defendant had only worked out the coal upon his own land above, which before had served as a barrier to the water descending from a higher grade. Neither negligence in mining nor wilfulness was imputed to the defendant. I cannot perceive, therefore, that the principles to be deduced from the rules stated, carry the right of the owner of the superjacent mine, beyond the admission of the consequences of his careful and skilful mining as lawful; and if a loss follow from water—the common enemy—it becomes merely *damnum absque injuria*. Hence, when water following the law of gravitation, after the removal of the coal in a careful and proper manner, finds its way by percolation or through fissures unforeseen and unknown, into the lower mine, its owner cannot complain of it as an injury done by the owner of the upper mine. These principles find support in the opinions in *Kauffman vs. Griesener*, 2 Casey, 407; and *Martin vs. Riddle*, Ibid. 415. I incline to think, also, that openings made before by a trespasser from the lower into the upper mine, and unexpectedly struck by the upper owner in mining, do not differ from natural fissures in the effect produced upon the lower mine. Though the owner of the lower mine may not be held responsible for the unlawful act of a tenant trespassing by making an opening from his into the upper mine, the owner of the upper mine is clearly not responsible to the owner of the lower mine for the trespass committed by the tenant of the latter. But while such may be the consequences of careful and proper mining above, when the owner of the upper has made no

openings into the lower mine, I think these consequences cannot be carried beyond this limit, to authorize the upper owner to mine in disregard of the rights of the lower owner. Here the maxim, *sic utere tuo ut alienum non lædas*, should have its full play. This maxim was applied by the Supreme Court in the case of *Jones vs. Wagner*, 16 P. F. Smith, 430, where a division of land was effected by a partition of the coal from the super-incumbent surface land. It was held that the owner of the coal vein must leave sufficient pillars to support the land above, and was liable in damages for an injury to a house caused by the sinking of the land into the chasm beneath. The case is not exactly parallel with that of adjoining owners who owe no special duty to each other, but still there had been a complete severance by partition of the coal from the land above, and the maxim was allowed its full force in settling the question of duty. When, therefore, as in the present case, the miner in the upper mine, in carrying forward his gangway strikes into a breast which has been wrongfully worked by a trespasser up the dip of his coal vein, he is not justified in emptying the water flowing down the drain or gutter of his gangway into the opening thus struck, if, by reasonable means, he can carry the water across the drain into the gutter or drain leading into his own sumpt. It is conceded this can be easily done by means of a wooden trunk stretched across the opening. Good mining requires the owner of every mine to ditch his gangway and lead off the water gathering in it to his sumpt, and thus to clear his mine of its enemy. There is no good reason, therefore, why the owner of the upper mine should suffer the flow of his gangway to run down upon the lower mine when by reasonable diligence he can prevent it. But it is argued that such means would be insufficient to carry through all the water in the case of a sudden overflow, from heavy rains or melting snow upon the surface; and much would necessarily pass into the lower mine. But clearly this is no excuse for a total neglect to make provision for carrying off the ordinary flow of water along the gangway, and for emptying it into the lower mine. Whatever might be the legal consequence of a sudden and extraordinary overflow in the mine, upon which no opinion is now called for, it cannot excuse the neglect to provide for carrying through the ordinary flow along the gangway. To adopt the principle that an upper owner is liable for no act done within his own mine and no neglect, because it falls within his own proprietary right, would lead to results disastrous to mining in general, and could not be tolerated. There are duties men owe to each other below the surface of the earth as well as upon it. My conclusion upon the whole case, after hearing the new affidavits, is, that the injunction should be continued, but in a modified form.

It is therefore ordered that the defendant be restrained from skipping the pillars in the breasts heretofore specified, until the report of the arbitrators appointed by the parties under the lease of the Hazel Dell mine shall be made, and after said report, he shall be restrained from skipping the said pillars contrary to the said report and no more; and that the said report shall be procured to be made within twenty days from this date. That the defendant shall be restrained and enjoined from permitting the ordinary current of water flowing from his mine along his gangways towards his sumpt from escaping and falling into the openings

leading therefrom into the mine of the plaintiffs; and that this injunction shall stand until final hearing and decree, or until superseded or otherwise altered by the court.

R. C. McMurtrie, Esq., for plaintiffs.

George M. Dallas, Esq., for defendants.

[Leg. Int., Vol. 29, p. 45.]

MOCANAQUA COAL COMPANY vs. THE NORTHERN CENTRAL RAILWAY COMPANY *et al.*

1. A preliminary injunction is never granted to enforce a *mere right*, but only to prevent irreparable mischief.
2. And it will not be granted when it will subject a defendant to loss without being of benefit to the plaintiff.
3. A mandatory injunction, as a general rule, can only be properly granted on final hearing, as its effect before that time is like awarding an execution before trial and judgment.

In equity. Motion for a special injunction to restrain the defendants from giving any undue preference in the transportation of coal.

Abstract of the opinion delivered *February 3, 1872*, by

WILLIAMS, J.—The bill as amended alleges, in substance, that the Northern Central Railway Company have entered into an agreement with the Philadelphia and Erie Railroad Company, and with the Lackawanna and Bloomsburg Railroad Company, by which they have acquired the privilege of transporting southward-bound coal over these roads to Sunbury in their own cars—that they are now engaged in the business of so transporting coal to Sunbury, from whence they transport it to various points on their own road, and through to Baltimore—that they have entered into an agreement with the Baltimore Coal and Union Railroad Company, or the Northern Coal and Iron Company, or both of them, or some other corporation or person, for or on behalf of them or one of them, directly or indirectly, for the transportation of coal from their mines situated upon the line of the Lackawanna and Bloomsburg Railroad, about fourteen miles eastward of the plaintiffs' colliery, to the city of Baltimore and intermediate points upon the Northern Central Railway, at lower rates, and upon terms more favorable than those at which they will transport the plaintiffs' coal from their mines to the same places—that they have made and continue to make an unreasonable discrimination in the rates of charge for transportation of coal to Baltimore and intermediate points on their road—that they have entered into a further agreement with the Baltimore Coal and Union Railroad Company, or the Northern Coal and Iron Company, or both of them, etc., for transporting their coal at more favorable rates than those accorded to the plaintiffs upon the road of the said company, viz., from Sunbury to Baltimore, and to intermediate points, to the irreparable injury of the plaintiffs—therefore they need equitable relief, and pray that said company may be restrained by special injunction until hearing, and perpetually thereafter.

Firstly and Thirdly. From charging plaintiffs any greater sum for transporting coal from their mines to Baltimore, or to any point upon the Northern Central Railway, than they charge at the same time to the Baltimore Coal and Union Railroad Company, or the Northern Coal

and Iron Company or any other person for transporting the same quantity of coal from their mines to the same place.

Secondly. From charging the plaintiffs for transporting their coal over defendants' road from Sunbury southward, any greater sum per ton per mile than is charged by them to the Baltimore Coal and Union Railroad Company, or the Northern Coal and Iron Company, or to any other person.

Fourthly. From refusing to transport coal over their own railroad or any other upon which they may have been engaged in transporting, at the same rates and upon as favorable terms as those for and upon which they transport coal for any other person or corporation whatever.

Fifthly. From giving any undue preference or advantage to or in favor of the Baltimore Coal and Union Railroad Company, or the Northern Coal and Iron Company, or any other person, for or in respect of the transportation of coal.

The affidavit of the President of the Northern Central Railway Company admits that the defendants have permission to run for three years from the 31st day of December last, their cars and locomotive engines over a portion of the road of the Lackawanna and Bloomsburg Railroad Company, for the transportation of anthracite coal; but avers that this license to run their cars and engines, is not by any means an exclusive one, and the plaintiffs are therefore free to negotiate with the Lackawanna and Bloomsburg Railroad Company for a similar privilege upon the same trackage terms and conditions as the Northern Central Railway Company enjoy.

That after considerable negotiation, the said Company procured permission from the Lackawanna and Bloomsburg Railroad Company, to run their cars and locomotive engines over a portion of the road of the latter company, by promising to carry at least 200,000 tons of coal per annum at certain fixed rates, or in default thereof, either in whole or in part, to pay tolls to an amount equal to the sum which would be payable if the whole quantity had been transported. Based upon this arrangement, the Northern Central Railway Company entered into an agreement with the Delaware and Hudson Canal Company, and with Jervis Langdon, both of whom were either owners of large, valuable and productive mines, or were operators on a large scale as miners and shippers of coal in the northern anthracite coal region, for furnishing an annual coal tonnage at least equal to that which it was required to carry or pay tolls upon, under the aforesaid license. To fulfil their several undertakings in consequence of these arrangements, the Northern Central Railway Company are already taxed to their utmost capacity to supply the necessary cars and motive power. Under this license the Northern Central Railway Company have been and are now transporting anthracite coal over a portion of the road of the Lackawanna and Bloomsburg Railroad Company. From Northumberland, the terminus of the Lackawanna and Bloomsburg Railroad, they carry coal in their cars over a part of the Philadelphia and Erie Railroad to their own road, and from thence to various points on their own road.

The affidavit admits that the defendants (the Northern Central Railway Company) are bound by law to transport coal upon their own road for all persons and corporations at uniform rates of charge, and that

equality is to be maintained as far as the road's capacity to accommodate at uniform rates will permit; but denies that any obligation or duty is imposed upon the company by law to transport coal or any other article of merchandise for any person or persons over a road, or any part of a road which is not owned by them either absolutely, or as lessees, notwithstanding they may have a license or permission for the purpose; and asserts that there is not any discrimination whatever upon the road of the Northern Central Railway Company between Sunbury and Baltimore, and intermediate points, in respect to the charges for transporting merchandise of a like description and quantity over the same portion of their road.

The affidavit moreover alleges, that if the injunction prayed for by the plaintiffs should be granted, one of its effects would be to compel the Northern Central Railway Company to send their cars and engines from their own road, no matter at what inconvenience to the company, or loss to the public doing business with it upon their own road, to perform a service for the plaintiffs, on the road of another and independent corporation in the full and complete enjoyment of all its rights and franchises, created, among other objects, for the express purpose of transporting coal and other merchandise on its own road.

It was suggested on the argument, that possibly the arrangement or agreement between the Northern Central Railway Company, and the Lackawanna and Bloomsburg Railroad Company, and the Philadelphia and Erie Railroad Company, by which the former company have permission or license to run their cars over the roads of the latter companies for the transportation of coal to their own road was *ultra vires*, and if so, the plaintiffs would not be entitled to the injunction prayed for.

But it seems to me that the agreement between these companies, so far as its nature and character are disclosed in the affidavit, is authorized by the act of the 23d of April, 1861, P. L. 410; *Purd. Dig.* 844; *Pl.* 41; which, among other things, declares that it shall be lawful for any railroad companies to enter into contracts for the use or lease of any other railroads, upon such terms as may be agreed upon with the company or companies owning the same, and to run, use and operate such road or roads in accordance with such contract or lease; *Provided*, that the roads of the companies so contracting or leasing shall be directly or by means of intervening railroads connected with each other.

The provisions of this statute are broad and comprehensive enough, as it would seem, to embrace and authorize the contract or license alleged and admitted to have been made and procured by the defendants in this case. If not, then I know of no authority for making such a contract. But if the act, as I am inclined to think, authorizes such a contract, what is its effect as it respects the duty and liability of the Northern Central Railway Company? Does it render the company common carriers, not of all kinds of merchandise and freights, but of anthracite coal over their own road and those portions of the roads of the other two companies over which they have permission or license to run, and over which they actually transport coal for the parties named in the bill, as admitted in the affidavit? I am inclined to think that it does. It seems to me that it could not have been the intention of the Legislature to authorize railroad companies to enter into contracts for the use or lease

of any other railroad, without subjecting them to the duties and liabilities of common carriers, so far as it respects their use of such roads and the kind of freight transported over them. But it is not necessary to express a positive opinion on this point, as the case is not before us on final hearing. Admitting, for the purpose of this application, that the Northern Central Railway Company under the license to run their cars and engines over the Lackawanna and Bloomsburg Railroad and the Philadelphia and Erie Railroad, for the transportation of anthracite coal from the mines of the Northern Coal and Iron Company to their own road at Sunbury, and from thence to Baltimore and intermediate points, are to be regarded and treated as common carriers of coal for the whole distance they transport coal over these roads, does it follow that the plaintiffs are entitled to the special injunction asked for in this case?

A preliminary injunction is never granted for the purpose of enforcing a mere right, but only for preventing irreparable mischief. Nor will such an injunction be granted when it will subject the defendants to loss without being of any benefit to the plaintiffs. Of what avail would it be to the complainants if the defendants should be enjoined, as asked in the 1st and 3d prayers of their bill, from charging them any greater sum for transporting coal from their mines to Baltimore, or to any point upon the Northern Central Railway, than they charge at the same time to the Baltimore Coal and Union Railroad Company, or the Northern Coal and Iron Company, or the Delaware and Hudson Coal Company for transporting the same quantity of coal from their mines to the same place, if the defendants altogether refuse to transport coal for the complainants on any other road except their own on any terms?

It is clear that the complainants are not entitled to the injunction asked for in the 2d prayer of their bill, viz., that the defendants be restrained from charging the plaintiffs for transporting their coal over said defendant's road from Sunbury southward, any greater sum per ton per mile than is charged by them to the Baltimore Coal and Union Railroad Company, or the Northern Coal and Iron Company, or to the Delaware and Hudson Canal Company, or any other person. The defendants admit their obligation to transport coal upon their own road for all persons and corporations at uniform rates of charge; and the affidavit of the president, as we have seen, positively asserts that there is not any discrimination whatever upon the road of the Northern Central Railway Company between Sunbury and Baltimore, and intermediate points, in respect to the charges for transporting merchandise of a like description and quantity over the same portion of the road; and there is nothing in the affidavits of the complainants which directly and positively contradicts the president's affidavit in this respect.

If the defendants should be restrained, as asked in the fifth prayer of the complainants' bill, from giving any undue preference or advantage to or in favor of either of the corporations named therein, or any other person, for or in respect of the transportation of coal, it might and would, doubtless, subject the defendants to serious loss by preventing them from fulfilling their contract with the Delaware and Hudson Canal Company, and Jervis Langdon for the transportation of their coal, without being of any benefit whatever to the complainants.

It is manifest that the only injunction which would be of any practical

benefit or advantage to the plaintiffs is that which is asked for in the fourth prayer of the bill—that is to say, that the defendants be restrained from refusing to transport coal for plaintiffs over their railroad, or any other upon which they may have engaged in transporting at the same rates and upon as favorable terms as those for and upon which they transport coal for any other person or corporation whatever. The injunction here prayed for, though not in form, is in reality, strictly mandatory, and, as ruled by the court in banc in *Audenried vs. The Philadelphia and Reading Railroad Company* (Legal Intelligencer, volume 28, page 12), such an injunction can be properly granted only on final hearing. But while it is admitted that this is the general rule, it is contended that there are, and must be exceptions to it in order to prevent the disastrous consequences which must otherwise flow from the commission of wrongful acts. But if this be conceded, the injunction asked for here does not come within the principle or reason upon which such exception can possibly be founded. Here the defendants are under no obligation imposed by their charter to transport the plaintiffs' coal over any other road except their own; and if they are liable to transport the plaintiffs' coal over the Lackawanna and Bloomsburg Railroad, and the Philadelphia and Erie Railroad to their own road, the obligation arises out of the license which they have obtained and exercise to transport coal for certain parties over those roads. The defendants have done no act which directly affects the plaintiffs, or prejudices their rights; they have not obstructed any avenue for the transportation of the plaintiffs' coal to market, nor done any thing to increase the cost or the difficulty of its transportation, and the plaintiffs have the same means of getting their coal to market that they had before the defendants obtained the privilege of transporting coal over the Lackawanna and Bloomsburg Railroad, and the Philadelphia and Erie Railroad. All that the defendants have done is to enable other parties to get their coal to market cheaper than they otherwise could, not to prevent the plaintiffs from getting their coal to market on the same terms that they formerly could. It is clear, therefore, that the plaintiffs are not entitled to the mandatory injunction prayed for. The respective rights and obligations of the parties must be first ascertained and determined, which can only be done on final hearing. To grant the injunction at this stage of the proceedings would be like awarding an execution in an action at law before trial and judgment.

The rule for a preliminary injunction must therefore be refused.

George M. Dallas and James E. Gowen, Esqs., for plaintiffs.

Chapman Biddle and Theodore Cuyler, Esqs., for defendants.

[Leg. Int., Vol. 29, p. 404.]

SCHOTT vs. SCHOTT'S EXECUTORS.

1. When a specific legacy is to be treated as a general legacy.
2. Where under a particular clause a legacy is given contingent upon an event happening either before or at the period fixed for the distribution of the general assets, the general intent that the distribution of the estate shall not be made until an ascertained time, will override the particular clause so as to defer the payment, and perhaps the vesting of the legacy, until the distribution of the estate, and this principle applies to a specific as well as to a general legacy.

Case stated. The following are extracts from parts of testator's will :

"Item. I give and bequeath to my executors hereinafter named, all my estate, real, personal, and mixed, in trust, however, for the following uses and purposes, and for no other." . . .

"Item. It is my will that no division or distribution of my estate shall be made until after the expiration of five years from the day of my death, and not then if my wife shall be living, and not until after the death of my wife."

He then proceeds to divide the income :

"One other sixth part to my son, Guy Bryan Schott, and in case of his death before the division of my estate, to his lawful issue, if he shall have any, but in default of lawful issue, to be discontinued and remain part of my estate, but if his wife, Marian, shall be living, I direct my executors to pay her five hundred dollars, she being comfortably provided for in her own right. . . .

"After the expiration of five years, and when the time shall arrive for the division and distribution of my estate, as hereinbefore provided for, it is my will that the whole of my estate that shall remain after the aforesaid legacies are paid and provided for shall be disposed of as follows, viz.: . . .

"It is my will that the whole of the remainder of my estate, real, personal, and mixed, shall be divided into four equal parts, and disposed of as follows, viz.: . . .

"One other fourth part to my son, Guy Bryan Schott; and in case of his death before the distribution of my estate, to his lawful issue, if he shall have any; and in default of lawful issue his interest shall cease, and his share shall be equally divided between his sisters, Charlotte S. Engles, Martha B. Whitney, and Maria L. Hand, and added to the amount they may otherwise be entitled to from my estate; but if my said son shall be living when the time arrives for the distribution of my estate, his share shall be paid to him and at his own disposal.

"In the event of the death of my son, G. Bryan, before the distribution of my estate, leaving no lawful issue, and his wife Marian shall then be living, I hereby authorize and direct my executors to pay her five thousand dollars, par value, of my Alleghany county five per cent. bonds; she being otherwise comfortably provided for in her own right."

Guy Bryan Schott, a son of the testator, died on the sixth day of September, 1871. The plaintiff is his widow. The executors of the will of James Schott paid to her, after her husband's death, the legacy of \$500, mentioned in the said will.

The plaintiff contends that she was entitled to receive also the \$5000 Alleghany county five per cent. bonds mentioned in the said will, on

the day of the death of her deceased husband. The defendants contend that she was not so entitled, and will not be entitled to receive the same until the expiration of the time at which it is provided by the said will that the estate of the testator shall be distributed, viz., five years after his death, provided the plaintiff should then be living.

If the court should be of opinion that she was entitled to receive the said \$5000 Alleghany county five per cent. bonds upon the said sixth day of September, 1871, judgment is to be entered for the plaintiff for the said sum of \$5000, payable in the said bonds, together with all the interest that has accrued, and been received thereon, since the said sixth day of September, 1871.

If the court should be of opinion that the said sum is not so payable to the plaintiff, then judgment is to be entered for the defendants, without prejudice to the plaintiff's right, or that of her legal representatives, to institute other legal proceedings after the expiration of five years from the death of the testator, if she or they shall then be lawfully entitled so to do.

Opinion delivered December 14, 1872, by

MERCUR, J.—James Schott died on the 23d day of October, 1870, having first made his last will and testament, wherein he provided *inter alia*, that, "in the event of the death of my son, G. Bryan, before the distribution of my estate, leaving no lawful issue, and his wife, Marian, shall then be living, I hereby authorize and direct my executors to pay her \$5000, par value, of my Alleghany county five per cent. bonds."

G. Bryan Schott, the son of the testator, died on the sixth day of September, 1871, before distribution of the estate was made; but whether he left lawful issue is not stated, although the counsel on both sides have argued the case as if he had left none, and it appears that a legacy of \$500 has been paid to his widow that she would not have been entitled to receive in case he had left issue. The plaintiff is his widow, and claims she was entitled to the said bonds upon the death of her husband. The defendants deny her right to demand them until the distribution shall be made.

Looking at the foregoing extract only, the plaintiff's construction would seem to be the correct one. In the event that "his wife, Marian, shall then be living," would indicate "then" as pointing to the time of her husband's death. The rule, however, by which a will is to be construed requires us to examine the whole instrument. Every sentence and word in a will must be considered in forming a judicial opinion upon it. *Turbett vs. Turbett*, 3 Yates, 187. The intention of the testator drawn from the words of a will taken altogether, must govern in its construction. *Lynn vs. Daines*, 1 Yates, 518. The intention of the testator, said Yeates, Justice, in *Findlay vs. Riddle*, 3 Binn. 149, has always been deemed the first, great, leading fundamental rule in the construction of wills. It is true, the intention of the testator shall not govern in the construction of a will where the rule of law overrules the intention. This is said to be reducible to four instances: 1. Where the devise would make a perpetuity. 2. Where it would put the freehold in abeyance. 3. Where chattels are limited in inheritances. And 4. Where a fee is limited on a fee. 2 Dallas, 244. To this list may be

added the case where the act of assembly of 27th April, 1855, makes that a fee simple estate which the testator intended should be a fee tail only. None of these exceptional cases, however, interpose in this case to prevent full effect being given to the testator's intention. It is the general intent of a will which controls in its construction. Hence the general intent being first ascertained, a court will, in order to give effect to such intent, overlook a particular intent inconsistent therewith. *Findlay vs. Riddle*, 3 Binn., 150.

Tested by these rules, and examining the whole will, we discover the great controlling idea and intention of the testator to be as expressed in the third item, "that no division or distribution of my estate shall be made until after the expiration of five years from the day of my death." Within those five years, certain legacies are made payable out of the income from his estate; but no portion of the principal shall be disturbed. After having made a disposition of the income to his several descendants, and persons intermarried therewith, in each case referring to the subsequent distribution of his estate, he says, "after the expiration of five years, and when the time shall arrive for the division and distribution of my estate, it is my will that the whole of my estate, real, personal, and mixed, shall be disposed of as follows." Then, after making some provision for several of his grandchildren, he again recurs to a general distribution in these words: "After the expiration of five years, and when the time shall arrive for the division and distribution of my estate, as hereinbefore provided for, it is my will that the whole of my estate that shall remain after the aforesaid legacies are paid and provided for, shall be disposed of as follows." Then follow other legacies to several other of his grandchildren, after which the testator says: "It is my will that the whole of the remainder of my estate, real, personal, and mixed, shall be divided into four equal parts." The income from one part thereof is given to each of his three several daughters during life, with power to dispose of the said part by will. The other fourth part thereof is given "to my son, Guy Bryan Schott; and in case of his death, before the distribution of my estate, to his lawful issue, if he shall have any; and in default of lawful issue his interest shall cease and his share shall be equally divided between his sisters . . . ; but if my said son shall be living when the time arrives for the distribution of my estate his share shall be paid to him and at his own disposal." Then immediately follows the clause first quoted, under which the plaintiff rests her right to recover upon the death of her husband. It appears from the portions of the will recited that no general distribution of the property, no division of the principal, was to be made until five years after the death of the testator. Neither son, nor daughter, nor grandchild, was entitled to receive one dollar of the principal within the five years. Within that time the legacies given to all of them were to be paid out of the income only. If the construction claimed by the plaintiff be correct she stands upon higher ground than either of the legatees, in whose veins the blood of the testator flows. Within the five years she can withdraw a portion of the principal of the estate, none of his descendants can. The general intent of the will leads to an entirely different conclusion. To give effect to that general intent, we say the true reading of the will is, "In the event of the death of my

son, G. Bryan, before the distribution of my estate, leaving no lawful issue, and his wife, Marian, shall be living at the time of said distribution." May we so change the language to effectuate the general intent? Words may be added, altered, or rejected, for that purpose. *Duffield vs. Morris*, 4 P. L. J. 79. The construction claimed by the plaintiff destroys the symmetry of the will, and would produce results inconsistent with the whole spirit of the distribution of the property proposed by the testator; while the other view, that the plaintiff is not entitled to the bonds until the general distribution of the property shall be made at the expiration of five years after the death of the testator, harmonizes all his dispositions, and accomplishes all his intentions. We may, therefore, safely conclude, that the latter is the true will of the testator. *Earp's Will*, 1 Par. 457.

Judgment is therefore to be entered for the defendants, without prejudice to the plaintiff's right, or that of her legal representatives, to institute other legal proceedings, after the expiration of five years from the death of the testator, if she or they shall then be lawfully entitled so to do, according to the case stated.

J. Vaughan Darling, George D. Budd and George W. Biddle, Esqs., for plaintiff.

Hon. William A. Porter, for defendant

[Leg. Int., Vol. 29, p. 117.]

ALTER vs. BROOKE AND BARRINGTON *et al.*

The resulting interest of an individual partner in an unsettled partnership is not subject to attachment execution; and an attaching creditor cannot maintain a bill in equity for an account of the partnership affairs.

The attachment execution does not amount to a statutory assignment of the partner's interest.

The bill is substitutional, and not ancillary to the attachment.

In equity. Bill for account, etc. Opinion delivered April 8, 1872, by AGNEW, J.—I regret that I cannot support this bill, as it would be to the interest of the parties to settle all their controversies in a single proceeding. It must fail, however, not because a bill for an account will not lie in behalf of one claiming the interest of a partner by a statutory assignment. The objection is twofold—first, that the plaintiff has not established the relation which entitles him to an account, and second, because the resulting interest of a partner in partnership effects, is not a debt within the meaning of the execution attachment law. I do not doubt the statement of Lewis, C. J., in *Lucas vs. Laws*, 3 Casey, 211, that where the interest of a partner in the partnership property passes to another person, it is immaterial whether the transfer be effected by a sale by himself, upon execution, by attachment, by death and succession, or by assignment under the bankrupt or insolvent laws. In every such case no doubt a bill will lie for an account. But the objection to this bill is, that the interest of neither Brooke nor Barrington has passed to or vested in the plaintiff. The plaintiff as the individual creditor of each, obtained judgment against each, and then attached the several interest of each in a partnership debt of Brooke & Barrington, coming from the Messrs. Phillips, who were served as garnishees in the count

of Lawrence. Stopping there without prosecuting the attachment to judgment, the plaintiff then turned aside, and came into this court to bring this bill in equity, to settle the account of the partnership. Now up to this point, there has clearly been no statutory assignment of the interest of either partner in the effects of the firm. The service of the attachment arrests payment, and holds the debt until the right of the creditor to take it shall have been established, but no more. But until judgment in the attachment, the creditor's right to stand in his debtor's shoes is not established, so as to say that the debt is vested in him by a statutory assignment. The debtor himself may show payment, release, set-off, or any good defence, which proves that the plaintiff is not entitled to a transfer of the attached debt. The garnishee also may defend on grounds suitable to himself. This shows that the foundation of the plaintiff's right to an account is wanting, to wit, a title by law to demand the debt in the hands of the Phillips'. The mere service of the attachment and the lien obtained by it, do not constitute an assignment by statute.

But it is argued that the account is necessary to enable the plaintiff to proceed with his attachment. The alleged reason is, that until the account shall have established a balance coming from the partnership to the partner, whose interest in it is attached, there is nothing to enable the jury on the trial, to find what goods or effects were in the hands of the garnishee according to the 60th section of the act of 13th June, 1836. *Purd. 494, Pl. 19.* Granting this necessity of showing an interest coming to the individual partner (and without a settlement of the partnership affairs, it is obvious the attachment must fail), the argument only proves that the resulting interest of the individual partner is not a debt attachable in execution. For if the attachment cannot be made effective without a settlement of the partnership, the attachment execution law has provided no means for settling the account. That law contemplates only a trial by jury to find the effects in the hands of the garnishee, and has provided no means for settling an account by auditors, account render, or bill in equity. But it is very evident the Legislature never contemplated the settlement of partnership accounts before the jury, as the means of ascertaining whether any debts exist which can be attached, otherwise a method would have been devised. It being admitted that the plaintiff in the attachment in such a case, must stop short of his remedy therein, in order to obtain a settlement of the partnership account, before he can proceed further, let us see whither a bill in equity would lead him. If the bill be entertained, its result is an abandonment of the attachment, and the remainder of the proceeding is necessarily finished in chancery. When a chancellor lays his hands upon a controversy, especially one so full of complications as this is, he proceeds to a final decree as the only means of settling the whole dispute. When the account is taken, and the several interests of the partners ascertained, the proceeding will not stop, and the result be certified into the common law court, in order to complete the attachment by a verdict and judgment against the garnishee. On the contrary, when the account is taken, the chancellor will decree finally what shall be done with the fund. The plaintiff has shown his own sense of this necessity by the frame of the bill, which prays for a final disposition of

the whole controversy. But if the attachment be not returned to, what becomes of its lien on the debt? It is very plain that without a return to it, the bill in equity is not ancillary, but is substitutional, and takes its place entirely, and this without it being judicially established, that the plaintiff was entitled to stand in his debtor's shoes to demand an account of the partnership affairs. It would be legislation in this court, to say that a bill in equity appropriate to settle the whole controversy, shall stop half-way, and that we will construct an ancillary proceeding out of it, and certify the result of the account into the Common Pleas of Lawrence county, where the attachments were issued. The two separate and independent jurisdictions cannot be thus dovetailed together.

The case of *Knerr vs. Hoffman*, 15 P. F. Smith, 126, I think settles the position, that the resulting interest of a partner in the partnership effects, is not an attachable debt under the attachment execution act. The reason is, not that the sum is unliquidated, though this has been strenuously argued against the attachment. The authorities, however, have settled this point. *Carland vs. Cunningham*, 1 Wright, 128; *Girard Ins. Co. vs. Field*, 9 Wright, 129. The true reason lies in the nature of the interest, which is not a specific thing, having a distinct and independent existence, but is a mere result, flowing from a comparison of accounts, and may fall on either side, as the balance happens to be. A specific debt or demand may be unliquidated, but nevertheless has its own independent existence, and may be ascertained by computation or by valuation. Not so with the interest of a partner in an unsettled partnership account. It results wholly from a comparison of the debits and credits of the partnership in the first instance, and then a comparison of the accounts between the partners themselves. If the debts of the firm exceed its credits, there will be no balance for division between the partners, and if there be a balance, whose it is, or how much of it, cannot be known till the account between the partners themselves is settled. It is obvious, therefore, that it is the nature of the interest, and not its unliquidated character which takes it out of the execution attachment law.

Strock vs. Little, 8 Wright, 416, has been referred to, but is not in point. Our brother Sharswood, in *Knerr vs. Hoffman*, struck the point of that case at once in saying, it was not held there, that the balance of an unsettled partnership account could be attached, but merely that an action of account render could be commenced between partners by the process of foreign attachment. The truth of this will be seen at once by adverting to the purpose of a foreign attachment, which is to compel an appearance, when the action proceeds in due course, followed by the proper judgment, as *quod computet* in account render, which was the case in *Strock vs. Little*. But the purpose of an execution attachment is satisfaction. The debt attached must, therefore, be such as the jury on the trial can ascertain and return in their verdict, or such as can be stated in the answer to the interrogatories and for which execution can issue. In execution attachment, clearly there can be no such thing as a judgment *quod computet*. It does not concern the garnishee, who knows nothing about the partnership accounts, and such a judgment lies between the partners themselves.

This bill cannot be maintained.

And now, April 8, 1872, the court gives judgment for the defendants, Brooke & Barrington, upon their several demurrers, and it is ordered that the bill of the plaintiffs be dismissed with costs to be paid by the plaintiff.

Per curiam.

Jesse Cox, Jr., and *B. W. Lacy, Esqs.*, for complainants.

Edward H. Weil and *Henry M. Phillips, Esqs.*, for Brooke & Barrington.

William S. Price, Esq., for Phillips.

George W. Biddle, Esq., for Richardson.

William L. Hirst, Esq., for Matthews.

[Leg. Int., Vol. 29, p. 140.]

WELSH AND WIFE vs. MEAD.

1. Where the *ca. sa.* against original defendant issued less than four days before the return day, and there was a return of *non est inventus*, motion for an *exoneretur* on the bail bond, was refused.
2. The practice of the District Court will be adopted by the Supreme Court at Nisi Prius, in the absence of practice to the contrary in the latter court.

Opinion delivered May 1, 1872, by

THOMPSON, C. J.—The original cause of action in this case was *trespass vi et armis*, the writ *capias ad respondendum*.

White and Butler became bail to the action under the act of 1836. The latter is dead, and the former applies for an *exoneretur* on the bail bond:

1. Because the *ca. sa.* on the judgment against defendant did not issue four days before its return day.

2. Virtual if not actual custody of defendant on the *ca. sa.*

3. Collusion of plaintiff with the sheriff's officer to fix the bail.

These reasons are in the reverse order of the brief, the first being the only one we can on this motion take notice of. The others will undoubtedly be matters of defence in the action on the bail bond, if suit is brought on it.

As to the first reason. It is to be found in Tidd's Practice, and is the old English practice in the King's Bench. We have no evidence that it was ever adopted in original cases in the Supreme Court at Nisi Prius, but it was in the District Court. As the jurisdiction is the same, and the law the same, it is, in the absence of practice to the contrary perhaps, best to adopt the practice of the District Court, thus learned from the English practice. I do not suppose that the change in the form of the entry of bail, since the act of 1836, can make any sensible difference in the mode of proceeding to fix the bail, on a *capias ad respondendum*. According to *Redney vs. Haskins*, 2 M. 466, the writ *ca. sa.* against the principal, in the judgment, must be in the hands of the sheriff four days before its return day, excluding Sunday. The reason of this, it would seem is, that the bail may get the principal to surrender himself in relief of his bail, as he is bound to do, or that they may do it whether he be willing or not, before the return day of the writ. If, however, there is not four days between the receipt of the writ by the sheriff and the return day, and there is a return of *non est inventus*, this fact would not be such as to entitle the bail to an *ex-*

oneretur, but it would entitle them to set aside the writ and avoid the effect of its return, at least for the time being. Without doing this, the effect of the return is to fix the bail, so far as the practice is concerned, but certainly it would not preclude a defence on other grounds of fact. This, however, I do not determine at present. This, the bail, have not done in this case, therefore, now, May 1, 1872, motion for an *exoneretur* refused.

Pierce Archer, Jr., Esq., for rule.

John H. Sloan and John Goforth, Esqs., contra.

[Leg. Int., Vol. 29, p. 116.]

THE ERIE RAILWAY CO. *vs.* THE WILKESBARRE COAL AND IRON COMPANY.

A corporation will not be enjoined from issuing bonds or selling personal property on complaint of a creditor, not holding a lien, or other legal claim against the property; much less upon a claim for unliquidated damages on a guarantee.

Sur motion to dissolve special injunction and vacate appointment of master.

This bill was filed on the 5th of March, 1872, charging that the defendants were insolvent and about to execute a mortgage and issue bonds thereunder in order to defeat a claim of the Erie Railway Company, upon a guaranty by the defendants of an agreement on the part of the Susquehanna and Delaware Railroad Company to build a railroad from Wilkesbarre to Hawley, and to furnish a certain amount of freight for transportation, after the completion of the road. The injunction affidavit was made by Jay Gould, in the third person, on the 23d February, 1872, and a special injunction was granted at chambers by Mr. Justice Read for five days, on the 5th of March (Mr. Justice Agnew then holding the Court of Nisi Prius), restraining the defendants "from issuing bonds under said mortgage, or from selling or transferring any of their real or personal property," with security in \$5000.

The affidavits of defendants denied insolvency, alleging that the company was the third largest coal producing company in the State, mining and shipping over a million of tons of coal a year, and employing over three thousand hands, and its assets were worth at their market value over all liabilities at least four millions of dollars; that the claim of the plaintiffs was illegal and asserted only to depress the market value of the stock of the company defendant, as was shown by the bid of F. A. Lane, a director of the Erie Railway Company, a few days before for one-half of the stock (\$1,700,000) at par. After a hearing at chambers the injunction order was modified so as to restrain the defendants from "disposing of their assets with the intent or for the purpose of removing the same from reach of legal process, and from all fraudulent dealing with any of their said assets." And John O'Byrne, Esq., was appointed a special master to report, "whether the said company is so dealing with its assets as to promote the financial interests of the company."

On the coming in of the answer, defendants moved to dissolve the injunction and vacate the appointment of the master.

For the defendant it was argued:

I. The affidavit should have been sworn to *after* bill filed.

"The affidavit must be sworn *after* the bill is filed. Otherwise it cannot be read, not having been made in a cause." 3 Dan. Ch. Pr. 1770; *Jackson vs. Cassidy*, 10 Sim. 326; *Francombe vs. Francombe*, 11 Jur. N. S. 123.

"No matter what the merits may be, an injunction founded on affidavits sworn before the filing of the bill cannot stand." *Williams vs. Davies*, 2 Coop. C. C. 172, n.

The reason is obvious: the party making the affidavit is not liable for perjury. 2 Bishop Cr. L. sec. 864, 871; Wharton A. C. L. sec. 2248; *Francombe vs. Francombe*, *ut supra*.

II. The affidavit should have been in the first person: Eq. Rules, No. 11, sec. 120.

This rule is strictly enforced in England. Kerr, 613; *Phillips vs. Prentice*, 2 Ha. 542; *Re Newton*, 2 D. F. & J. 3.

III. It is also defective as not stating the grounds of the affiant's belief, "so as to show that he has some reasonable and proper cause for making the statement, and has not sworn merely to raise an issue." Kerr, 613.

Where the facts on which the injunction is asked are not within the personal knowledge of the plaintiff, he should state the fact on his own information and belief, and annex the affidavits from whom he obtained the information, or some other person who can swear to the material allegations of the bill. *Campbell vs. Morrison*, 7 Paige, 157; *Bank vs. Skinner*, 9 Paige, 305.

"The plaintiff should, by his affidavit, also state some actual violation of his rights, or a sufficient ground to apprehend it. Thus, in cases of waste, an affidavit merely as to his apprehension or belief that the defendant intends to commit waste, without stating any grounds for it, will not be sufficient. There must either be some fact, like marking trees or sending a surveyor, or some threat. 2 Dan. Ch. Pr. 1771.

IV. Under the new English rule, as adopted by this court, in *Warren and Franklin R. W. Co. vs. Clarion Land Co.*, 4 P. F. Smith, 28, a special injunction is not yet of "course" like a rule to plead.

Mammoth Vein Co.'s Appeal, Id. 183; *Richard's Appeal*, 7 Id. 105; *Rhodes vs. Dunbar*, Id. 294; *Brown's Appeal*, 12 Id. 17; *Clark's Appeal*, 12 Id. 347.

V. It is the right of the defendant to move to dissolve on the coming in of the answer. *Kneedler vs. Lane*, 9 Wr. 238; 3 Dan. Ch. Pr. 1786-7; *Poor vs. Carleton*, 3 Sumner, 70; Hilliard on Injunctions, 78, 88.

VI. The contract between the Erie Railway Company and the Delaware and Susquehanna Railroad Company was illegal, and the guaranty by the company defendant was *ultra vires* (citing cases.)

VII. Without judgment and execution unsatisfied a creditor cannot restrain a debtor's disposition of his property. *Suydam vs. Insurance Co.*, 1 P. F. Smith, 394; *McKenzie vs. Cowing*, 4 Cr. C. C. 479. And the statute of 13 Elizabeth was reported by the judges as in force in this State.

VIII. A court of equity will not undertake to edit a newspaper (*Martin vs. Vanschaick*, 4 Paige), nor to run a steamboat (*Crane vs. Ford*, Hopkins, 114), and should not engage in the mining business.

Opinion delivered April 8, 1872, by

AGNEW, J.—Upon the affidavits alone I am satisfied this injunction

should be dissolved, putting aside the technical objections. It is not simply doubtful, but it seems to me there is no sufficient ground for the charge of insolvency and fraud alleged in the affidavit of Jay Gould against the defendants. There are, however, other reasons of weight which, with the insufficiency of the charges of insolvency and fraud, should determine the special injunction, and free the defendants from the disability imposed by it in transacting its business affairs. To tie up the hands of a company such as it is, and prevent it from selling its bonds to pay off its floating debt is a serious matter, and should not be done unless in a clear case of intended fraud, one in which the chancellor cannot doubt or hesitate. The act prohibited is not one directed at another, or trenching upon another's rights, but is simply and purely a transaction of its own, relating to its own concerns, and to nothing else. The only wrong it can effect consists, not in the act thus prohibited, but in the use it will hereafter make of the money realized from the sale of its bonds. It is perfectly clear that a creditor, and this is the only attitude of the plaintiff here, cannot enjoin his debtor from raising money to pay other creditors in the absence of a lien, attachment, assignment, or other legal claim on the property of the debtor. *Suydam vs. North Western Insurance Co.*, 1 P. F. Smith, 394.

A few of the reasons adding weight to the conclusion referred to, I shall now state. In the argument the plaintiff claimed to be a creditor of the defendant, under the instrument of guaranty and assumption of October 6, 1866, to the extent of several millions of dollars, under those clauses in the contract between the plaintiffs and the Susquehanna and Delaware Railroad Company, of the same date, which provided for the furnishing of a given quantity of coal for transportation on the Erie Railway in each year; and on failure to furnish the same, that the Susquehanna and Delaware Railroad Company should pay as liquidated damages, and not as penalty, the sum of fifty cents per ton, for every ton of coal which it should fail to furnish. But clearly no such claim can be enforced. These clauses of the contract of the Susquehanna and Delaware Railroad Company have reference to the running of the railroad after it shall be finished. The first and principal covenant of that railroad company with the plaintiff is the one to build the railroad from Wilkesbarre, in Luzerne county, to Hawley, in Wayne county, and to connect it with the plaintiff's railway. Until this was done, the covenant that the railroad thus built should be delivered to the plaintiffs to be operated by them, and the covenant to furnish certain quantities of coal each year for transportation over the Erie Railway could not take effect. It is therefore clear to my mind, that the only claim of the plaintiffs upon the Susquehanna and Delaware Railroad arises on the breach of the covenant to build the railroad from Wilkesbarre to Hawley; and for this only could the defendants be made liable (if at all) upon their guaranty. But this is a claim for unliquidated damages, extremely uncertain and indefinite; not attempted to be ascertained or set forth in the bill, and of which no proof has been given. Though the contract with the Susquehanna and Delaware Railroad was made in 1866, no averment of notice is made or given to the defendants; or proof of a demand of any sum as justly due to the plaintiffs upon the breach of the covenant to build the road. The plaintiffs have rested quiescently ever since, while the Sus-

quehanna and Delaware Railroad Company has been deprived of its charter by a judicial proceeding in behalf of the Commonwealth, on the ground that it has not complied with its charter by commencing to build its road within the three years prescribed by law, and indeed never secured the capital or means to enable it to do so.

I have also strong doubts of the validity of the instrument by which the plaintiffs claim to be a creditor of the defendants. The whole transaction seems to be to appropriate the capital and powers of the Wilkesbarre Coal and Iron Company (the defendant) to purposes entirely *ultra vires*. An examination of the agreement of the 6th of October, 1866, between the Erie Railway Company and the Susquehanna and Delaware Railroad Company shows that while the building of the new railroad was the principal and necessary feature of it to carry out the remaining provisions, that the supply of coal and regulation of the coal business entered largely into the arrangement, and this part of it was evidently to be performed by the defendants. The defendants are expressly referred to in the 8th and 16th and 17 sections of the contract. The guaranty of the 6th of October, 1866, is of even date with the contract, and was executed in New York, some of the same parties as the directors of the defendants being also connected with the Erie Railway Company, and a few weeks later we find the Susquehanna and Delaware Railroad Company assigning and transferring to the defendants their contract with the Erie Railway Company and its supplement, with all the rights and privileges appertaining to it. In connection with this is also to be noticed the second clause in the writing executed by the defendants on the 6th of October, 1866, by which, in addition to the guaranty, they *assumed* the restrictions, *duties* and damages arising under the said contract and supplement on the part of the Susquehanna and Delaware Railroad Company, and in further connection the fact that the Susquehanna and Delaware Railroad Company never had any means to build the new railroad. In view of these facts it seems to be obvious that the Wilkesbarre Coal and Iron Company was the real party to the contract of the 6th October, 1866, and undertook to apply its capital and powers as a corporation to the building of the new railroad from Wilkesbarre to Hawley. Now this was in clear violation of its charter, no power whatever being conferred upon it to build a railroad for general transportation; its only power being to build lateral railroads not exceeding five miles in length in furtherance of its legitimate business as a coal and iron company.

There are other matters pressed in the argument, but which I consider it unnecessary to notice or pass upon. Upon the whole case I am of opinion the injunction should be dissolved and the appointment of the master revoked.

And now, April 8th, 1872, it is ordered that the motion to dissolve the injunction heretofore granted in this case be allowed, that the injunction be dissolved, that the appointment of the master be revoked, and that the case proceed to final hearing or other decree in due course of procedure.

Per curiam.

Samuel G. Thompson and Theodore Cuyler, Esq's., for plaintiffs.

Samuel Dickson and Charles Gibbons, Esqs., for defendants.

[Leg. Int., Vol. 30, p. 13.]

SCOTT vs. INSURANCE COMPANY.

Defendant's plea alleged that the insured had answered falsely the interrogatory in an application for life insurance, and averred that he had a certain disease of the lungs, etc. The replication set forth that insured "had no such disease, etc., with which the insurers ought to have been made acquainted."

Held, A departure; plaintiff allowed to amend.

Demurrer to plaintiff's replication. Opinion delivered by

AGNEW, J.—A contract of insurance is voluntary, and the insurer may therefore prescribe the terms on which he will enter into it. He may require the insured to answer all the questions put to him relative to the subject of insurance, and make it a condition, that his contracts shall not be binding if the answers, or any of them, are false. He is entitled to all the information he deems necessary to determine his consent to the contract.

In the defendant's fourth plea they aver that the policy was made on this condition; that the fourteenth interrogatory is: "Has the party been afflicted during the past seven years with any severe or constitutional disease, and what?" and the answer to it is: "Six years ago had typhoid fever; no other serious illness." The plea then avers, that the party (James W. Scott) had been afflicted during the seven years last past with a severe and serious disease and illness known as inflammation of the lungs; which they are ready to verify.

This plea is evidently founded on the fourth condition of the policy, which provides expressly, that the answers and declarations are the basis of the contract, and if found in any respect untrue, the policy shall be void.

It sets forth the fourteenth interrogatory and the answer to it, and the untruth of the second clause of the answer as the breach.

Had the first clause of the answer only been made, leaving out the second, to wit, that Scott "*had no other serious illness*," the breach would not have been the answer or declaration of an untruth, but would have fallen under that clause of the declaration which avers that the party has *concealed* or *withheld* no material circumstance which renders the policy more dangerous, or which ought to have been communicated to the directors. But as the breach is laid expressly upon an alleged *false* answer, and not upon a matter *withheld* or concealed merely, the falsehood which caused the breach is the material averment. Hence when the defendants pleaded the fact of a severe and serious disease and illness, known as inflammation of the lungs, happening during the last period of seven years, that fact became the subject of the replication. The plaintiff had a right to deny the fact and take issue upon it; or admitting the fact of having had the disease, to deny that it was a severe or constitutional disease, and take issue on that fact; either of which would be, if found for her, a perfect replication to the plea. But the plaintiff did neither. She does not reply simply that he had no such disease as inflammation of the lungs within the time averred, but she qualifies the replication by saying he had no such disease "which rendered an assurance on his life more than usually hazardous, or with which the directors of the company ought to have been made acquainted."

This is clearly a departure. The fact averred was a serious illness or disease within seven years. The averment of this fact was to show that the answer, "no other serious illness," was false, and being false, it was a breach of the fourth condition of the policy. Whether, if true, such illness would have made the risk more hazardous, or was such as the directors ought to have known, is not the question. The question is, whether the interrogatories were *truly* answered; because the contract was agreed to be on that basis. The allegation of no concealment is not issuable, but shifts the ground, so as to prevent the defendants from taking their defence under the fourth condition, and departs to another portion of the declaration made to procure the policy, relating to concealment, to which the plea is not applicable. In short, the defendants averred a *falsehood*, which avoided the contract, *not a concealment*; and it is not in the power of a plaintiff to compel them to shift their ground. The plaintiff may deny his having had the disease at all, or she may deny that it is a severe or constitutional disease within the meaning of the fourteenth interrogatory, and thus raise an issue.

Looking at the ground covered by the 8th, 10th, 11th, 12th, 13th, 15th and 16th interrogatories, it may be doubtful whether the 14th was intended to apply to any other than a chronic or constitutional disease existing "*during*" the period of the seven years. It is scarcely probable the 14th was intended to cover the same ground as the other interrogatories, but rather to ascertain whether the party was subject to a continuing or enduring *affliction*, severe in its character, or one which is constitutional, and therefore is of like kind. Where the interrogatory is doubtful (and using the word *during* instead of within certainly makes it not very clear), the assured is not to take the risk of the doubt. *Insurance Co. vs. Croppen*, 8 Casey, 351; *Buckley vs. Insurance Co.*, 11 Wright, 209-211. However, this point is not decided.

My conclusion is that the demurrer must be sustained, but to enable the plaintiff to amend, leave is granted to the plaintiff to amend.

Chapman Biddle, Esq., for plaintiff.

George Junkin, Esq., for defendant.

[*Leg. Int.*, Vol. 30, p. 37.]

LONG vs. COCHRAN & RUSSELL.

Where there is an adequate remedy at law, there is no jurisdiction in equity.

In equity. Demurrer to plaintiff's bill. Opinion delivered *January 25, 1873*, by

MERCUR, J.—The defendants have assigned four causes of demurrer. They are substantially:

1. The plaintiff does not present such a case as entitles him to the relief for which he asks in a court of equity.
2. It is not such a case as entitles him to an account as prayed for.
3. The plaintiff has a full, complete, and adequate remedy in a court of law.
4. All the persons shown to be necessary parties are not made parties thereto.

The bill charges that the plaintiff was the owner of large quantities

of land, which were supposed to be favorable for the mining of oil, and being anxious to dispose of the same, met with the defendants, and it was agreed that an oil company should be formed, called The Mercantile Petroleum Company, the capital of which should be \$400,000; the plaintiff should convey five certain pieces of land, in the bill described, to said company, for which he should be paid the sum of \$200,000. Thirty thousand dollars thereof to be paid in stock, and the balance in cash, when the same should be realized from the sales of said stock. The defendants were to receive the subscriptions, sell the stock, originate the corporation, and pay over to the plaintiff, when received by them from the sales of stock, the consideration aforesaid. The defendants were to receive for their services the sum of \$10,000. That in pursuance of said agreement, the company was duly formed and incorporated, and the plaintiff conveyed said land. That the defendants acting under said agreement, sold all or nearly all the stock of said company, to wit, eighty thousand shares, and received for the same the sum of five dollars per share; that the defendants, although justly bound to account for the full consideration stated, out of the moneys coming into their hands as receivers aforesaid, for plaintiff and the other parties conveying the lands, have not paid over to him any money or consideration whatever, save six thousand shares of said stock, which plaintiff accepted for the sum of \$30,000. The bill also avers, that "other conveyances of land were made by other parties," and prays that an account may be taken of all the stock sold and moneys received by the defendants for and upon account of the parties conveying said lands to said company; that an account be stated showing to what portion of the same the plaintiff is entitled; and that said defendants be decreed to account and pay over to the plaintiff whatever sums may be found in his favor, and for general relief.

This, then, was a single transaction. The plaintiff was to convey certain lands, for which the defendants were to pay him \$200,000—\$30,000, part thereof, in stock, and the residue of \$170,000 in cash, when the same should be realized from the sale of stock. The plaintiff conveyed the land. The defendants have sold the stock for which they have actually received \$400,000, but have paid plaintiff \$30,000 only. The residue of \$200,000 remains unpaid and in the hands of the defendants.

There is no averment that any portion of these \$400,000, which the defendants have received, was from the sale of stock based upon the lands conveyed by other parties. It is distinctly charged that the said eighty thousand shares, from the sale of which said sum was realized, were sold by "the defendants acting under said agreement." There was no other agreement than the one already stated.

The case does not require any examination of accounts. There is no prayer for a discovery. It is simply that an account may be taken and stated. Any inquiry in regard to the "other conveyances of land made by other parties" is wholly irrelevant.

Acting under and in pursuance of the agreement with said plaintiff, the defendants have sold the stock, and have received therefor twice as much money as they agreed to pay the plaintiff. The demand is for a specific sum—a sum which they have received for the use of the plaintiff and retain.

What prevents a recovery therefor in an action of assumpsit? Will not that give a full, complete, and adequate remedy? Under existing laws there is no impediment in the way of compelling the defendants to disclose, under oath, in a common law action, all the facts necessary to sustain the complainant's allegation, as fully as they can be compelled in a court of equity. All reasons for sustaining a bill, predicated upon a necessity for procuring the defendants' testimony, are now removed. The remedy is full, complete and adequate in a court of law. The third cause of error is sustained. This makes it unnecessary to discuss the other causes assigned

Demurrer allowed.

Thomas R. Elcock, Esq., for plaintiff.

E. S. Miller, Esq., for defendants.

[Leg. Int., Vol. 30, p. 45.]

BUTLER vs. BUTLER.

1. A devise of a residuary estate in trust, one moiety to be conveyed to A on her attaining the age of twenty-eight years, the other moiety to B on his attaining the like age, with a gift over on either dying under that age, of his or her moiety, in trust for the survivor, gives a vested equitable estate to each, in order that the clear intent of the testator, that the issue, in the event of death under such age, leaving issue, should take, may be carried out.
2. A limitation for the accumulation of income, until a minor attains the age of twenty-eight years, becomes void on his attaining full age, by the provisions of the ninth section of act of April 18, 1853, Pamph. L. 507.
3. An evident intention that a devisee should not have possession and dominion over the principal of the estate, until he arrives at the age of twenty-eight years, is certainly lawful, and a trust created to give effect to such intention is an active trust.

Hearing on the bill and answer.

The bill stated that the testator died on the 28th day of March, A. D. 1868, seised and possessed of a large, real and personal estate, having made and published his last will and testament in writing, bearing date the 12th day of March, A. D. 1868.

That by the will the said E. H. Butler, after certain specific legacies and bequests, did order and direct his trustees therein named to set apart and reserve a fund sufficient to produce a yearly income of nine thousand dollars, and to pay the said income to his wife, Eliza Butler, for the maintenance and support of herself and children during her life. And all the rest and residue of his estate whatsoever, he did then give to said trustees, and to the survivor of them, in trust, to invest, and from time to time to change, reinvest and keep invested the same, in such a manner as would in their judgment best promote the interests of his estate until his daughter, Mary E. Butler, should attain the age of twenty-eight years, at which time one-half should be conveyed to her absolutely, if in the judgment of his trustees his estate could then be divided without detriment, and if not, then as soon thereafter as in their judgment it could, with due regard to the interests of all parties, be so divided. And the remaining portion to hold as thereinbefore directed, until his son Edgar H. Butler should attain the age of twenty-eight years, when it should be conveyed to him absolutely; and further directed that should either of his children die before attaining the age of twenty-eight years and without issue, then his or her share would be held in trust as therein

directed for the benefit of the survivor. The testator then made provision that in case of the death of his wife, before his daughter should attain the age of twenty-eight years, his trustees should pay his said daughter four thousand dollars per annum, until she should attain said age. And in the event of his wife dying before his son Edgar H. Butler should attain such age of twenty-eight years, his trustees should pay him such sum per annum as would, in addition to his other resources, produce him an annual income of four thousand dollars, until he should attain said age."

That the said E. H. Butler left only issue one daughter, the said Mary E. Butler, who was of the age of twenty-two years at the time of his death, and who died on the 13th day of October, A. D. 1868, unmarried, intestate, and without issue; and one son, Edgar H. Butler, the plaintiff herein, who was of the age of nineteen years at the time of the death of his said father, and who attained the age of twenty-one years on 20th day of January, A. D. 1870.

That recently the interest of the said estate in the said firm of E. H. Butler & Company, in which the testator had directed his trustees to carry on the business in accordance with the terms of the articles of partnership, had been disposed of, and no cause existed touching the interest or convenience of the estate, why distribution should not be made.

That the plaintiff was advised that the complete equitable interest in the residuary estate was vested in him, and that he was then and had been, since his arrival at the age of twenty-one years, entitled to the whole of the rents, income and profits thereof; and that there was no duty for the trustees, defendants, to perform, or other reason for the legal estate remaining in them.

Wherefore he prayed—

a. That the said will of the said testator be established and carried into execution by and under the decree of this honorable court, and the said trustees, defendants, be decreed to convey and transfer to him all the said residuary estate, accretions, rents, income and profits thereof.

b. That an account be taken of the rents, income and profits of said residuary estate, received by said trustees, defendants, in which they be allowed all moneys by them expended on account thereof.

c. That if it be not decreed that said trustees convey and transfer all said residuary estate to said orator, it be decreed that said trustees, defendants, pay over to him all said rents, income and profits thereof, after deducting moneys paid as aforesaid, which have accrued since his arrival at the age of twenty-one years, and all such which might hereafter accrue.

d. That said orator might have such further relief in the premises as the nature of his case required, and to their honors might seem meet.

The defendants admitted the facts alleged in the bill, but stated that they were advised that they had no right to abandon the trust or surrender the estate.

Counsel for plaintiff cited *Redfield on Wills*, vol. II., 603; *Hawkins on Wills*, 237; *Phipps vs. Williams*, 5 Sim. 470, 9 Cl. & Fin. 583; 4 M. & G. *1109; *Minning vs. Batdorf*, 5 Barr, 504; *Hawkins on Wills*, 210; *Lippincott vs. Warder*, 14 S. & R. 117; *Mifflin vs. Neal*, 6 S. & R. 480;

Rapp vs. Rapp, 6 Barr, 48; *Bedford's Appeal*, 4 Wr. 23; *Hughes vs. Sayre*, 1 P. W. 534.

Opinion delivered *February 1, 1873*, by

SHARSWOOD, J.—I entertain no doubt that the plaintiff, Edgar H. Butler, under the will of his father, has a vested equitable estate, and that if there is any implied trust for the accumulation of the income, it becomes void on his obtaining full age, by the provisions of the ninth section of the act of April 18, 1853, Pamph. L. 507. But I am of the opinion that it was the evident intention of the testator that the plaintiff should not have possession and dominion over the principal of the estate until he arrived at the age of twenty-eight years, and that to carry this intention, which is certainly lawful, into effect, it is necessary to hold the trust created by him to be an active trust. I must decline, therefore, the first prayer of the bill marked *a*, but grant the second and third prayers marked *b* and *c*.

Decree accordingly.

Charles S. Pancoast, Esq., for plaintiff.

E. Spencer Miller, Esq., for defendant.

[Leg. Int., Vol. 30, p. 46.]

MCBRIDE vs. PATTON.

Defendant may be allowed to amend his answer by a formal denial of the averments in plaintiff's bill.

Sur bill and answer. Opinion delivered *February 1, 1873*, by

SHARSWOOD, J.—I consider that the answer in substance negatives the averment in the bill, that the execution of the will of his wife by the plaintiff was in order to comply with the requirements of the law of Minnesota, and for no other purpose, but as the defendants have asked leave to amend their answer by a formal denial of that averment, I think they ought to be allowed to make that amendment. When that amendment is made, if the plaintiff prefers a decree on the bill and answer, to going to proofs, we can set the case down for that purpose.

Amendment of answer allowed.

Samuel Hood, Esq., for plaintiff.

George Junkin, Esq., for defendants.

[Leg. Int., Vol. 30, p. 45.]

GABRYLEWITZ vs. THE CITY.

In an action against the city for damages from a sewer, where there was evidence that the city remedied the defect as soon as notified, and that it was in part occasioned by the improper construction of plaintiff's vault, the verdict will not be set aside as being against the evidence.

Sur motion for new trial. Opinion delivered *February 1, 1873*; by

SHARSWOOD, J.—As to the first reason, that the verdict is against the evidence and the weight of the evidence, I do not think that I ought to set aside the verdict of the jury. It was fairly submitted to them under instructions which are not complained of, and there was evidence, not only that the defendants had remedied the defect in the sewer as soon as it was discovered to be the cause of the injury, but that the injury was

at least in part occasioned by the improper construction of the plaintiff's vault.

As to the second reason, the rejection of the letter of July 1, 1872, it is a mistake in fact. The letter was admitted, though under the limitation that it was evidence of complaint and notice, but not of the facts stated in it. I do not remember that it was asked to be used, certainly no exception was taken to the ruling of the court.

As to the third reason, that the panel was illegally drawn, nothing has been proved to sustain it.

Rule discharged.

E. Waln, Esq., for plaintiff.

R. N. Willson, Esq., and *C. H. T. Collis*, city solicitor, for defendants.

[Leg. Int., Vol. 30, p. 46.]

PALETHORP vs. WHITAKER.

A plea that plaintiff's cause of action was, in a former action by the defendant against the plaintiff, pleaded by the plaintiff as a set-off, and adjudicated in that action, is a plea in bar and not in abatement.

Rule to strike off plea. Opinion delivered *February 1, 1873*, by SHARSWOOD, J.—This rule was taken upon the idea that the plea which the court is asked to strike off is irregular, because it is a plea of the pendency of a former action, which is in abatement, and cannot be pleaded after a plea in bar, nor without an affidavit, but the plea is evidently not of this character. It avers distinctly that the cause of action set forth in the plaintiff's declaration was, in a former action by the defendant against the plaintiff, pleaded by the plaintiff as a set-off, and had been passed upon and adjudicated in that action. If this be so, it is clearly a plea in bar, and not in abatement.

Rule discharged.

Robert Palethorp, Esq., for plaintiff.

W. R. Dickerson, Esq., for defendant.

[Leg. Int., Vol. 30, p. 46.]

TAYLOR vs. THE ADAMS EXPRESS COMPANY.

1. In replevin the sheriff is not bound to take any step in the execution of the writ until he is made secure by sureties and safe pledges, etc. The bond is a condition precedent. The service of the writ on the defendants as a *summons* is void, and they are not bound to appear and plead.
2. The entry of a general appearance in such case is not a waiver of the irregularity.

Demurrer to plea.

Marian Taylor, plaintiff, was employed as a prima donna at Fox's Varieties. On the 16th of April, 1872, she issued a writ of replevin, returnable to the first Monday of May, directing the sheriff to replevy from the express company, three trunks, containing wearing apparel, viz., twenty dresses, two shawls, three pairs of boots, five pieces of stage jewelry, a lot of music, sixty play-books, two musical instruments, and one diamond ring—of the value of one thousand dollars. The sheriff served Henry C. Gorman, agent, with a copy of the writ, and summoned the defendants through him to appear. By their attorney the defendants then entered a general appearance. In the meanwhile the sheriff did not seize the goods, alleging that the plaintiff had failed to give him an indemnity bond, and he made no return to the writ until the first Monday of December, 1872.

The plaintiff's attorney, however, before that time, proceeded to file his declaration, to which the defendants put in a plea, setting forth that the writ had never been executed, for want of indemnity to the sheriff, although the defendants had been summoned. To this the plaintiff filed a special demurrer, and the defendants having joined therein, the points raised were argued first before Judge Mercur, on a preliminary motion, and afterwards before Judge Sharswood on the pleadings.

It was contended on the part of the plaintiff, that the general appearance for the defendants was a waiver of any irregularity in the service of the writ, and on the part of the defendants it was insisted that while such was the law in general, yet in replevin the case was different, since the writ must first be executed before it can have any vitality. That the sheriff had no right to serve the writ as a summons, and return that he did not seize the goods because the plaintiff had failed to make him secure.

Opinion delivered February 1, 1873, by

SHARSWOOD, J.—This case presents rather a novel and curious question. It is a writ of replevin to which the return of the sheriff was, that he served it "by giving a true and attested copy thereof to Henry Gorman, agent of said company, and making known to him the contents thereof. The goods as mentioned in said writ were not replevied and delivered to plaintiff, she, the plaintiff, not making me secure of prosecuting her claim." Mr. Webster entered an appearance for the defendants. The plaintiff filed a declaration in the *detinet*, and ruled the defendants to plead. The plea which is now demurred to was, in effect, that the writ was never executed; to which the objection urged is, that it is no answer to the declaration.

It is clear that the writ was not executed. It was certainly a mistake in the sheriff to take any step in the execution before the replevin bond was delivered to him. The act of 1705, 1 Smith, 44, provides, that "it shall and may be lawful for the justices of each county in this province to grant writs of replevin in all cases whatsoever, where replevins may be granted by the laws of England, *taking security as the said law directs*, and make them returnable to the respective courts of common pleas in the proper county, there to be determined according to law." Our form of writ is in accord with this express injunction of the statute. "We command you that you cause to be replevied and delivered unto the plaintiff, if he makes you secure of prosecuting his claim," etc., and that "you put by sureties and safe pledges the defendant that he be and appear," etc. The security for prosecuting the claim is a condition precedent, and the sheriff would certainly have been justified in refusing to serve the writ on the defendant. It is contended, however, that the appearance waives this irregularity, and that the action by the clause of summons is a proceeding *in personam* as well as *in rem*. Undoubtedly, in purely personal actions, and even in mixed actions, this rule holds good. Even in real actions, appearance will cure defects in the service of the process. But replevin is a very peculiar form of action, and some return by the sheriff as to the goods seems absolutely necessary to enable the court to pronounce a judgment in the case. If the goods are replevied and delivered to the plaintiff, the judgment for the plaintiff is, that he

recover his damages for the taking and unjustly detaining. The judgment for the defendant is *pro retorno habendo*. Where the goods have not been delivered to the plaintiff, and either left with the defendant or not being found, the return is *eloigned*, the plaintiffs recover as well their value in damages as damages for their detention. *Easton vs. Worthington*, 5 S. & R. 130. It is said that in this case we may, perhaps must, assume, either that the goods were left in the possession of the defendant upon a claim of property, or were *eloigned*, as the count to which the defendant is called on to answer is in the *detinet*. The defendants might certainly plead *non ceperunt*, but then if the plaintiff prove that they had ever been in possession they must be defeated on that issue; and how is a defendant to protect himself who is lawfully and innocently in possession, the finder or the common carrier, if ready to deliver the goods to the plaintiff in replevin on his giving security as the law directs? Here the goods have never been lawfully demanded, and yet, if this argument holds good, the defendant will have a verdict against him for the value of the goods in damages, without any evidence of conversion; the return of *eloigned* if the plaintiff proves a taking, and unless the defendant shows a lawful possession would be evidence of conversion; and so certainly would be a delivery to the defendant upon a claim of property. It seems to me, therefore, that without a return of the sheriff, or an agreement of the parties as to the goods, which are the principal subject of the writ, the court would not be able to give any judgment appropriate to the form of action.

I think, therefore, that the plea is an answer to the action. Perhaps it is properly a plea to the jurisdiction of the court, assuming the act of 1705 as requiring the security to be taken as a condition precedent. In that aspect the appearance is of no consequence. At present I overrule the demurrer, and if the defendants apply I will give them leave to withdraw this plea and appearance, as I am of opinion that they certainly were not bound to appear and plead, and under the circumstances, as they might well conclude, when served with the writ, that it had been duly executed, it is a case in which they ought not to be held to their appearance.

Demurrer overruled.

George W. Arundel and L. Hirst, Esqs., for plaintiff.

David Webster, Esq., for defendant.

[Leg. Int., Vol. 30, p. 46.]

HEVENER vs. HEIST.

1. Defendant came to this city by reason of a forged telegram, and was, on his arrival, served by deputy sheriff. The burden of proof is upon plaintiff to explain how the deputy sheriff knew of his arrival.
2. If defendant is decoyed into the jurisdiction of the court by the plaintiff, or by any one on his behalf, the service will be set aside.

Rule to set aside service and quash writ.

The defendant, a resident of Bucks county, was telegraphed for, and came in response to the telegram to this city, and was shortly after his arrival served with a *capias* in an action for slander.

Defendant's counsel cited as to when service in civil suit will be set aside, where criminal prosecution used for purpose of bringing defendant

within jurisdiction of court for the purpose of then suing him civilly. *Addicks vs. Bush*, 1 Phila. R. 19; *Commonwealth vs. Daniels*, 6 Penna. Law Journal, 330; *Benninghoff vs. Oswell*, 37 How. Pr. Rep. 235.

As to when service will be set aside if defendant is decoyed into jurisdiction of court. *Union Sugar Refining Company vs. Mathieson*, 2 Cliff. C. C. Rep. 309; *Williams vs. Reed*, 5 Dutch (N. J.), 385; *Carpenter vs. Spooner*, 2 Sand. 717; *Goupil vs. Simonson*, 3 Abb. Pr. Rep. 474; *Metcalf vs. Clark*, 41 Barbour, 45.

Opinion delivered *February 1, 1873*, by

SHARSWOOD, J.—I am satisfied upon the depositions that the defendant was decoyed into this jurisdiction, if not by the plaintiff himself, by some one acting in his behalf. The defendant was telegraphed to by some one in the name of Hoffman, "Come down by three o'clock train. Meet me at Merchants' Hotel." The defendant is a member of the bar and was acquainted with Jacob Hoffman. Jacob Hoffman testified that he never sent such a despatch. Two other gentlemen of the same name of Hoffman were examined, with the same result. The defendant testified that he knew no other persons in Philadelphia of that name. When Mr. Heist came down to Philadelphia in obedience to the telegram, and went to the Merchants' Hotel, he was immediately arrested there. Under these circumstances I am clearly of opinion that it was incumbent on the plaintiff to produce the sheriff's deputy who made the arrest, in order to show that it was not by the instruction of the plaintiff or his attorney that he went with the writ at that time to that place to arrest the defendant.

Rule absolute.

Wm. H. Eichelberger and Benjamin L. Temple, Esqs., for plaintiff.

George M. Dallas, Esq., for defendant.

[Leg. Int., Vol. 30, p. 52.]

WENTWORTH vs. RAIGUEL.

1. When certain members of a partnership, who were also members of a previous firm which was indebted to the new firm, applied the assets of the new firm, without the consent of their partner therein, to the payment of the debt of their previous firm, they are in equity liable *jointly and severally* to their partner for his share of the assets thus misappropriated.
2. The act of April 14, 1838, giving a remedy at law to parties who are partners of several firms against each other, did not take away the previously existing remedy in equity.

Opinion delivered *February 8, 1873*, by

SHARSWOOD, J.—When this case was before me on exceptions to the first report of the master, I dismissed all the exceptions but the twenty-second, twenty-fourth and twenty-fifth. The administratrix of Ulp, having been made a party and filed an answer, that defect in the proceedings is supplied. The other two exceptions were grounded upon the objection that the master had reported an account of the plaintiff with the firm of Raiguel & Co., No. 3, of which firm alone he was found to be a member, had recommended a decree in his favor, against the other members of that firm, and had not made a final settlement of the partnership, by ascertaining the balances due by and to each partner separately.

I saw then nothing on the face of the report which ought to vary the rules which seem to be well settled in regard to partnership accounts generally. It was accordingly referred back to the master to reconsider and report as to these matters.

Upon his supplemental report, he finds very distinctly, and there is no evidence before me upon which I can re-examine that finding, "that nothing else remains to be settled between the partners, irrespective of the amounts due on account of John Wentworth's interest in No. 3." He has also found that this indebtedness of the firm of Raiguel & Co., No. 3, to John L. Wentworth, arose entirely from misappropriation by the other members of the firm, who were members of the firm No. 2, of the assets of No. 3, to the payment of the debts of No. 2. He hence draws the conclusion, that the members of No. 2, who are members of No. 3, are liable to the plaintiff *in solido*. It would follow that justice could be done in no other way, than by a decree against the defendants *in solido*, and until one or more of these defendants pay this amount, there can be no decree as between themselves, settling their respective contributory shares. That must be left to a subsequent proceeding.

If these facts were stated in the former report, I failed to extract them from it, or they were not distinctly brought to my notice. They very much affect the view to be taken of the case. To simplify the matter, if the assets of a firm of A, B, & C, are applied to pay the debts of a former firm of A & B, without the consent of C, it would seem that, as A & B would be liable to answer *in solido* to the firm of A, B, & C, A & B must in equity be held *in solido* to C for his share of such debts. Prior to the act of April 14, 1838, P. L. 457, the firm of A, B, & C could not have maintained an action at law, against the firm of A & B. The appropriate remedy of C would have been a bill to account. If, as the master reports, all other accounts between the members of the firm of A, B, & C have been settled, except what grows out of this misappropriation of the assets of A, B, & C, to the injury of C, I see no objection to such a decree as will do justice between the parties. I observe that the bill distinctly avers the fact of the misappropriation. It follows, that until either A or B pay this debt for which they are jointly and severally liable, what they respectively owe each other cannot be ascertained and settled. The act of 1838, which gave the remedy at law, did not take away the previously existing remedy in equity.

On the whole, then, I have come to the conclusion to dismiss these exceptions, and confirm the report.

Decree accordingly.

W. J. McElroy, Esq., for plaintiff.

G. M. Dallas and J. E. Gowen, Esqs., for defendants.

[Leg. Int., Vol. 30, p. 52.]

MORRIS, TRUSTEE, *vs.* BANCROFT *et al.*

A ground-rent reserved in "lawful silver money of the United States, each dollar weighing 17 dwt. 6 grs., at the least," can be paid in gold coin.

This was a case stated on a ground-rent deed in 1857, reserving a rent in "lawful silver money of the United States, each dollar weighing 17 pennyweight and 6 grains at the least."

Opinion delivered *February 8, 1873*, by

SHARSWOOD, J.—It will not be worth while to discuss the question presented by the case stated on principle. I would find it difficult to do so. But I must consider one thing as settled by the Supreme Court of the United States, that Congress, under the power to coin money and regulate the value thereof, can settle conclusively the value of a dollar, so as, at least, to reach and bind all subsequent contracts. It is necessary, in order to enable them to do this, that they should have power to say what the relative value of gold and silver shall be in the coinage. The proportional value of gold and silver in all coins is settled then by the acts of Congress of 18th of January, 1837, Brightley's Digest, 1852. After providing for the weight of the respective gold and silver coins, it is provided that for all sums whatever, the eagle shall be a legal tender for ten dollars, and the quarter eagle for two and a-half dollars. So by the act of March 3, 1849, *Ibid.*, "for all sums whatever the double eagle shall be a legal tender for twenty dollars, and the gold dollar shall be a legal tender for one dollar." I cannot, it seems to me, strike out of the contract the words "dollar" and "lawful silver money of the United States." And the acts of Congress have declared, without regard to the weight of the silver dollar, whether it be of the weight provided before January, 1837, or since, that a gold dollar shall, in legal tenders upon all contracts, be equal to it in value.

Judgment for the plaintiff \$692.42, coin, with interest from December 1, 1872.

William Henry Rawle and R. C. McMurtrie, Esqs., for plaintiff.

E. Spencer Miller, Esq., for defendants.

[Leg. Int., Vol. 30, p. 52.]

SPERING *vs.* SMITH *et al.*

The costs allowed in equity proceedings are subject to the discretion of the court.

Taxation of defendant's bill of costs. In equity, December 11, 1872.

I.

a. Printing demurrer of defendant.

Objected to because the demurrer was overruled by the court. *Allowed by prothonotary, because it was a part of the pleadings in the cause, and therefore embraced in rule 3, equity practice*.....

\$47 20

b. Printing answer of defendants..... 48 50

II.

a. Drawing demurrer for defendant—Ashton..... \$8 40

b. Drawing answer for defendant—Ashton..... 39 00

c. Two motions and notice to opposite counsel..... 40

The other portions of this general item, *not allowed*. They are for "copies to keep," and are predicated upon the fourth item of "parties"

costs," in the equity fee bill (without date), established about the year 1846. But the new rules of equity practice adopted May 27, 1865, require these pleadings to be printed, and the former rule for supplying manuscript copies is, in my opinion, abrogated.

III.

Parties' costs for fees paid by them :

Examiner.....	\$400 00
Master.....	1000 00

1. *Examiner.* There were about 190 pages of matter or testimony taken by the examiner, which, according to the equity fee bill, which allows five cents per line of ten words, would amount to \$326.40; eleven affidavits at 12½ cents each, \$1.37; and exhibits at 25 cents each; the number of these on part of the defendant was not precisely shown, but enough was shown to justify the allowance claimed as above, namely, \$400.

2. *Master's fee.*

In considering the question of the allowance of the sum herein charged:

1. The large amount claimed in dispute must be taken into view.
2. The number of days the master sat to hear the arguments of counsel, and the time taken in the examination of the authorities cited, and in making up the report.

The sum in controversy exceeded one and a half million of dollars; the master sat twenty or more days in hearing the arguments, and he was occupied more than thirty days in the examination of the numerous authorities cited by counsel, and two or three days in writing out his report.

It is true that the charge seems large, nevertheless, in view of the protracted services of the master, which extended from the 28th of April, 1868, to the 20th of August, 1870, a period of two years and four months, I feel authorized to sustain the charge herein made.

1. It was contended by the learned counsel for the exceptions to the bill, that the master's fee should be limited to that allowed by a recent act of assembly to *auditors*, on the principle that the duties were analogous.

2. That the plaintiff being primarily responsible for the master's fee, he ought to have been consulted in reference to it. This was not done, nor was he notified of it; nor had he any knowledge of the amount of the master's fee, or of its payment, until this bill of costs was filed.

3. That there is an impropriety and irregularity in the master in asking for his fee from the defendants, in whose favor the report was made.

The prothonotary is of opinion that the act of assembly in relation to auditors does not, either directly or indirectly, apply in this case. The new equity rules allow the master a compensation for his services, "having regard to all the circumstances of the case."

2. It would certainly be a proper and convenient practice that the opposite party should be notified of the amount charged by the master before it was paid by the party in whose favor the report was made. But there is no rule requiring it. Previous to the adoption of the present equity rules, the master was not required to file his report until

his fee was paid. Now the master is not permitted to retain his report as a security for his compensation, but it is usual for him, and in accordance with the rules he is permitted to receive his fee before he files his report, from either party who is willing to pay him.

The amount of this fee is of course a matter to be fixed by the court in its discretion when a proper appeal is made to it.

As at present advised, and in view of all the circumstances of the case, I will allow the charge herein made and paid to the master.

J. ROSS SNOWDEN, *Prothonotary*.

Recapitulation.

I. Printing demurrer of defendant.....	\$47 20
Printing answer of defendant.....	48 50
II. Drawing demurrer of defendant—Ashton.....	8 40
Drawing answer of defendant—Ashton.....	39 00
Two motions and notices to opposite counsel.....	40
III. Parties' costs for fee paid examiner.....	400 00
do. do. do. master.....	1000 00
IV. Witnesses' fees.....	12 50
	<hr/>
	\$1556 00

On February 1, 1873, Justice Sharswood confirmed the report of the prothonotary, with the exception of the master's fee, which was reduced.

The prothonotary was attended by *George Biddle, Esq.*, for bill of costs, and by *J. Howard Gendell, Esq.*, contra.

[Leg. Int., Vol. 31, p. 53.]

THE BOARD OF MISSIONS OF THE DIOCESE OF PENNSYLVANIA *vs.*
THE SOCIETY FOR THE ADVANCEMENT OF CHRISTIANITY IN
PENNSYLVANIA.

The bequest for missionary work in the diocese of Pennsylvania is a charity to be administered upon the enlarged and liberal principles which courts of equity have always applied to such trusts.

The meaning of a testator depends upon what his words meant at the time they were used.

The plaintiffs in this case were not the persons referred to under the same name in the will. They are not competent to administer the trust.

The defendants are competent.

Statement of the case.—Thomas Masters Clark, of the city of Philadelphia, a member of the Advancement Society, by his will bearing date the 28th day of October, 1864, and duly admitted to probate in the said city on the 23d of October, 1867, after devising the income of the whole of his estate to the use of his sister, Sarah Clark, for life, directed that upon her death, said estate should be converted into money, and that after the payment of certain legacies, one-third of the residue should go "to the Society of the Protestant Episcopal Church for the advancement of Christianity in Pennsylvania, to be used in the missionary work in the diocese of Pennsylvania, if they are engaged in that work, otherwise to be paid by them to the board of missions of the diocese of Pennsylvania for the same purpose."

The testator died on or about the day of October, 1867. His sister, Sarah Clark, the devisee for life, died on or about the 16th day of March, 1869, and on the 23d day of April, 1872, the executor of said

testator paid to the defendants the sum of \$3744.84 (three thousand seven hundred and forty-four dollars and eighty-four cents) on account of the share of the residuary estate so as aforesaid bequeathed to them.

The plaintiffs demanded that this money should be paid them.

In 1859, the defendants, in compliance with a request of the convention of the diocese of Pennsylvania, retired from missionary operations in the diocese.

The diocese of Pittsburg was set off from the old diocese of Pennsylvania in 1865.

The diocese of Central Pennsylvania was established in 1871. Since that event, the five counties, Philadelphia, Bucks, Montgomery, Chester and Delaware, constitute a complete diocese under the title of the diocese of Pennsylvania.

At the annual meeting of the Advancement Society, January 6, 1872, certain amendments to the constitution were adopted, by which the new order of things was recognized, the following, among other clauses, being part of the constitution:

"The bishops of the diocese which are or may be in the State shall be ex-officio presidents of the society. The senior bishop present at any meeting shall preside." The board of trustees shall have power, "among other things," to send forth missionaries under the sanction and direction of the ecclesiastical authority of the diocese to which they may be sent.

At the annual meeting of the Advancement Society in January, 1873, they directed notice to be given to the authorities of the present diocese of Pennsylvania, that owing to changed circumstances, they recalled their pledge given in 1859, and resumed all powers held in abeyance.

The society is now doing missionary work in the diocese of Pittsburg, and in the diocese of central Pennsylvania.

The plaintiffs are a missionary board appointed by the convention of the present diocese of Pennsylvania.

The defendants are not a diocesan institution, but a voluntary association chartered by the Commonwealth of Pennsylvania in 1810.

The defendants refused to pay the money as requested, asserting their own right to administer the charity under the will, but expressed a willingness to join in an amicable effort to obtain a judicial decision of the question.

The cause was argued on bill and answer January 26, 1874, before Judge Sharswood.

Opinion delivered *January 31, 1874*, by

SHARSWOOD, J.—The bequest of Thomas M. Clark to the defendant of one-third of his estate, "to be used in the missionary work of the diocese of Pennsylvania," is beyond all question a charity, to be administered upon the enlarged and liberal principles which courts of equity have always applied to such trusts. What then did the testator mean by the diocese of Pennsylvania? At the date of his will it was an ecclesiastical jurisdiction, comprehending the entire State. He intended that all parts of the State should enjoy the benefit of his bequest. Had the diocese been subsequently divided into three dioceses, with different names, it would hardly be pretended that any one of them would have been entitled to the exclusive benefit of the charity. If there were no

trustee competent to administer the charity in the wide extent intended by the testator, a curious question might arise. But it is not disputed that at the present time the defendants are fully competent. Why then should the administration be transferred to the plaintiffs, who are confessedly incompetent? It is true they are in name the board of missions of the diocese of Pennsylvania, but not the board of the diocese of Pennsylvania, as contemplated and intended by the testator. They are the board of missions of a different diocese—with jurisdiction only over five counties in the eastern part of the State—a small part of the field within the view of the testator at the time of the date of the will, with no power to engage in missionary work beyond the limits of those counties. I see no good reason, looking to the substantial intent of the testator, why a court of equity should decree the transfer of the administration of this charity from the defendants to the plaintiffs. Bill dismissed with costs.

Joseph C. Fraley and William M. Tilghman, Esqs., for plaintiffs.

W. W. Montgomery and P. P. Morris, Esqs., for defendants.

[Leg. Int., Vol. 30, p. 76.]

PRICE vs. SPENCER et al.

A person may proceed in *equity* for compensation for services, under a contract with an association, although he was one of its members and one of the signers of the contract.

Exceptions to master's report. Opinion delivered *March 1, 1873*, by AGNEW, J.—This is a peculiar, and not a clear case. I am inclined to think, however, that the plaintiff is entitled to compensation under the contract of December 21, 1867. Being himself a member of the association, and one of the signers of the contract with himself, he has no remedy by action at law, as the District Court held in an action on the covenant. (For opinion of Hare, P. J., see 7 Phila. R. 179.) That he performed services under the agreement is undeniable, and it will be singular if there be no remedy at law or in equity to recover compensation. The difficulty in the case seems to flow from the original adventure having come to an end, and the fault of this the report of the master eventually places at the door of the plaintiff. But is this a reason to refuse partial compensation?

The original purchase through Gilmore and McManus fell through, but not by any fault of the plaintiff. When he arrived at Durango, he found he had no title which would enable him to take possession of the mines and work them, in consequence of the purchase money not being paid to Mr. Sanchez by the first purchaser. He negotiated with Sanchez, and purchased from him directly, and on better terms. But he could not go on under the new arrangement, without submitting his acts to his associates for ratification. This he did by returning to Philadelphia. They ratified his purchase, and tried to raise means to pay the purchase money, but after considerable delay failed. Here the master lays the fault at Price's door, because he was a member of the association. But it is not in the case, that they raised their proportions, and he failed to raise his. The adventure fell through by a common fault. But the plaintiff had earned a portion of salary before this failure. He had gone to Mexico under the agreement, and visited the mines, and the original

purpose fell through by no fault of his. When it fell through, he endeavored to carry it out by a new arrangement, and performed his duty to the best of his power, and his effort was ratified. How, then, can the subsequent failure of the association to carry the substituted arrangement into effect deprive him of his reward for services actually rendered under the agreement?

This brings the case to the question, did he earn anything under the agreement? The master interpreted it, that the salary was only for *working* the mines; and not having done so, and not having made *silver bars*, the prescribed medium of payment, the plaintiff is entitled to nothing under the agreement.

True, the *annual* salary is for working the mines, the chief and continued subject of reward; but does the agreement include no more? Does it not include the initiatory services also? I think so. The agreement of the plaintiff was to do two things. First, to proceed as agent and attorney of the association from Philadelphia to the mines of Mr. Sanchez in the Guanacevi mining district in Mexico, examine the mines and ascertain their fitness. Second, to take possession and work them for the association. For these services, but one compensation was provided in the agreement—a salary of \$5000, payable in quarterly instalments, the first beginning on the 1st of April following. The contemplated year in the contract began, therefore, on the 1st of January, 1868. The date of the contract being December 21, 1867, the duties of the plaintiff necessarily began within ten days, and at Philadelphia, the place of starting. Now, although working the mines was the chief service for which the salary was contemplated, the absence of all other compensation, and time the salary was to begin, together with evident justice of compensation, makes it clear, that the salary included the initiatory, as well as the last named services. It could not have been the intention, that the plaintiff should make a long, dangerous, and toilsome journey in mid-winter, to a remote, wild, and semi-barbarous region, there to exercise his skill and judgment in determining the character and availability of the mines, make preparations for mining, and only begin the working of them, months after the year had commenced, and yet have nothing for services so arduous and so valuable. This would be the effect, if the contract were interpreted as understood by the master. Certainly such could not have been the purpose of the parties. The payment of the \$2000 for expenses cannot alter the interpretation of the contract. There is no evidence that this payment was understood to be a part of the agreement, while the expenses necessary for such a journey and to make preparations for mining would be great. There being no proof to alter or modify the written agreement, its interpretation must rest upon the writing itself. The services being rendered on the footing of the agreement, and before the adventure fell through, it seems to me the plaintiff is entitled to a due proportion of his salary. This would be three quarterly instalments, the master having reported that the enterprise was abandoned in October, 1868.

The finding of the master disposes of the \$2000, consumed in necessary expenses, excepting so much as the plaintiff expended in payment of his son. Though no cross-bill was filed, the sum thus illegally expended would be a fair and legitimate abatement from the plaintiff's salary, to be ascertained and reported by the master.

The exceptions of the plaintiff, therefore, are sustained, and the case is referred back to the same master, to find the balance of salary due the plaintiff, and to report the same to the court with the form of a final decree in accordance with this opinion.

Thomas R. Elcock and William J. McElroy, Esqs., for plaintiff.

George Junkin, Esq., for Spencer and Firth.

George Northrop, Esq., for Hazewell.

[Leg. Int., Vol. 30, p. 76.]

ALLEN vs. BUCHANAN.

The Legislature cannot repeal a charter granted prior to the constitutional amendment of 1857.

A committee of the Legislature has not the judicial power to investigate and declare that a corporation has been guilty of unlawful acts.

Demurrer to narr. Opinion delivered *March 1, 1873*, by

AGNEW, J.—The charter of the Eclectic Medical College of Pennsylvania was granted by act of assembly in 1850, before the amendment of the constitution in 1857. It contains no power of repeal. That such a charter is a contract between the State and the corporations, as to the franchises granted, is well settled. *Iron City Bank vs. City of Pittsburgh*, 1 Wr. 340. Without a judicial proceeding to declare a forfeiture of the charter upon cause shown, there is no power to repeal it summarily. *Erie and North East Railroad Company vs. Casey*, 2 Casey, 301; *Same vs. Same*, 1 Grant, 271; *Commonwealth vs. Pittsburgh and Connelsville Railroad Company*, 8 P. F. Smith, 46–7. The act of 22d March, 1872, is the act of but one party to the contract without a power reserved in the contract to authorize the State to do the act, and being without the consent of the other party (the corporators) is nugatory, because of the Constitution of the United States, Art. 1, § 10, and the Constitution of the State, Art. 9, § 10, forbidding the passage of laws impairing the obligation of contracts. The recital in the preamble of the act of 1872, that it had been ascertained by evidence produced before a committee of the Senate, that the Eclectic Medical College had been guilty of unlawful, discreditable, and dangerous acts, on which the repeal was thereupon declared, does not help the case. The committee had no judicial power, and could not turn itself into a court of justice to take jurisdiction, summon, and try the corporation for its offences. It was but a portion of the legislative body itself, charged with a function, merely ancillary to legislation. Its judgment was no more than the judgment of the body conferring upon it the power of inquiry. The act of 1872, repealing the charter, was therefore without legislative force and void. The corporation is entitled to a trial in due course of law, to ascertain its breach of duty, before its charter can be taken away. A franchise is a valuable privilege, and is property in the contemplation of law; and the body possessing it is as much entitled to a judicial determination of its right or want of right, to hold it, as a natural person is of his right to his lands or his goods. The defendant is therefore entitled to judgment upon his demurrer.

The demurrer is sustained, and judgment thereupon for the defendant, that he go without day and be paid his costs.

Wm. H. Staake, Esq., for plaintiff.

Kinley J. Tener, Esq., for defendant.

[Leg. Int., Vol. 30, p. 76.]

WHETHAM vs. PENNSYLVANIA AND NEW YORK CANAL AND RAILROAD COMPANY *et al.*

The statute of limitations is a good plea in bar of an action upon stock which has been forfeited over six years for non-payment of assessment.

On bill and plea. Opinion delivered *March 1, 1873*, by

AGNEW, J.—The plea in this case is not double. He sets forth a forfeiture of the stock in question for non-payment of an assessment, not as the substantive ground of the plea, but as an absolute and distinct act of denial by the corporation, of the plaintiff's right to the stock. Hence it is not set forth in such terms of legal certainty as to constitute a legal bar in and of itself; but in such as to fix a positive act, and a distinct period of time from which the delay of the plaintiff shall be counted against him. This being only inducement, the final and declarative assertion in the plea is the lapse of time offered as an equitable bar to the plaintiff's bill.

In the case of *McKelvy vs. Blair*, decided at the last Pittsburgh term, we held that in analogy to the statute of limitations, a bill for an account filed more than six years after the dissolution of a partnership, the defendant not being a liquidating partner, and no proceeding having been taken to compel an account in the meantime, was barred by lapse of time. This had been substantially decided before in *Hamilton vs. Hamilton*, 6 Harris, 29. That delay is regarded in equity as a bar to a remedy is sustained by many authorities, some of which will be found collated in *Read vs. Goodyear*, 17 S. & R. 350. See also *Ashhurst's Appeal*, 10 P. F. Smith, 290; *Fleming vs. Calvert*, 10 Wright, 498.

The claim of Whetham, the plaintiff here, is purely in equity. He claims by outstanding certificates of stock transferred to him, not presented for transfer to himself, while Miller, who has the legal title to the stock standing in his name, has not asserted his title at all, and is made a co-defendant. These facts are rightfully assumed, for the plaintiff has set forth in his bill no excuse for his delay, and has not replied to the plea any ground to relieve himself of the effect of facts set up in the plea. The question, therefore, on the bill and plea, arises solely upon the naked effect of ten years delay after forfeiture of the stock, be that forfeiture regular or irregular.

There is a class of cases bearing on this question which shows that even where the relation of the parties is that of agent or attorney, or in a partial sense confidential, yet delay will bring the party who ought to have demanded an account or settlement within the operation of the statute of limitations. *Finney vs. Cochran*, 1 W. & S. 112; *Alexander vs. Leckey*, 9 Barr, 120; *Laforge vs. Zane*, Ibid. 410; *Campbell vs. Boggs*, 13 Wr. 524; *Pittsburgh and Connelsville Railroad Company vs. Byers*, 8 Casey, 22; *Rhines vs. Evans*, 16 P. F. S. 192. The principle, to be extracted from this class, is, that diligence is necessary to enable a party to avoid the running of the statute of limitations. Hence, though in many instances a demand may be necessary before the institution of suit, yet the want of it when it is the party's own neglect, will not stop the running of the statute. In this case the plaintiff was in default, for though holding only a title in equity by the assignment of the certificate,

he made no demand to be admitted to the privilege of a stockholder, and his claim was necessarily unknown to the corporation. It was his duty before the six years had expired to ascertain the condition of the stock, and to demand a transfer. Had he done so he would have found the forfeiture on the stock entry, and would have at once been prompted to measures to set it aside if irregular.

Having these views of the case, judgment must be given for the defendants on the plea.

Michael Arnold, Jr., Esq., for plaintiff.

James E. Gowen, Esq., for defendants.

[Leg. Int., Vol. 30, p. 77.]

FOX vs. SNYDER.

In an action on a bond for \$1481.50, conditioned that the defendant should improve a certain lot by a specified time and in a certain manner: *Held*, that defendant not having performed his covenants, judgment should be entered for the amount stated in the bond, which was also held to be liquidated damages.

Rule to show cause why judgment shall not be entered for want of a sufficient affidavit of defence. Opinion delivered *January 11, 1873*, by

MERCUR, J.—The plaintiff declared on a bond under seal executed by the defendant to plaintiff, bearing date March 9, 1869, in the sum of \$1481.50, conditioned that if the said defendant should improve, or caused to be improved, within two years from the date thereof, on the lot that day conveyed by said plaintiff to defendant, by the erection of dwelling-houses fronting on Oxford street, each to be similar or not inferior to those built by — Lewis during the years 1868–69, on the north side of Columbia avenue, etc., so as to fully comply with this agreement, then said obligation to be null and void, “or else to be and remain in full force and virtue as liquidated damages for the non-compliance thereof.”

With a copy of the bond the plaintiff filed a suggestion under oath, that the defendant did not erect or commence the erection of any house or houses such as are in said bond stipulated, at or before the expiration of two years from the execution and delivery of said bond, nor were there any such houses erected thereon, nor had there been any such.

The defendant swears that he has a full, just and legal defence to said action, the nature of which he gives, and is substantially this, to wit: that about the time he purchased the aforesaid lot of plaintiff on the northwest corner of Seventeenth and Oxford streets, he also purchased one other lot of him on the northwest corner of Sixteenth and Oxford streets; that the reason plaintiff gave for requiring said bond, was because he desired said first-mentioned lot to be improved, and thus enhance the value of surrounding lots, of which he was and still is a large holder; and to indemnify the plaintiff against any loss which he might sustain by reason of the failure of the defendant to enhance the value of ground in that vicinity, was the sole object for which the bond was given. That defendant proceeded to erect and finish two houses on the lot of ground at the corner of Sixteenth and Oxford streets, which houses were much superior in character, style and finish to the kind which he was bound to erect by the terms of his contract, and to the

same degree increased the value of plaintiff's property. And that the bond had no further consideration nor significance, being no part of the consideration paid for said lot. Also, that defendant subsequently built upon the lot of ground immediately west of the one referred to in the bond, eighteen dwelling-houses, which have greatly added to the value of plaintiff's other lots, and much more than fulfilled the conditions of the bond. That he has further entered into a contract with a responsible builder to erect upon the lot of ground mentioned in said contract, twelve substantial three-story brick houses, that the necessary papers have been prepared and work upon said buildings will be commenced in a few days upon this said lot, where he had agreed to erect two houses only.

It will be observed the defendant does not swear that he has erected any dwelling-houses upon the lot on which he agreed to build; nor that he has erected elsewhere, any one similar or not inferior to those he was obligated to build; but that he has erected in other localities several houses whereby the plaintiff has been benefited as much as if he had fulfilled his contract. This, however, is a question not given to the defendant to decide. The written instrument shows the only contract between the parties. The defendant does not aver the making of any other or different one. There is no ambiguity in it. It clearly expresses what the plaintiff required, and what the defendant agreed to perform. A contract to sell and deliver a pair of horses not more than four years old suited to driving in a carriage, is not satisfied by a tender of a pair eight years old, although in the judgment of witnesses the latter were much more valuable to the vendee.

The defendant avers that he has now entered into a contract for the erection of houses on the lot in question, yet he does not affirm that they are to be of such a description, style or value, as required by the contract. There has been no fulfilment of the contract.

What then is the measure of damages? Is the sum mentioned in the bond to be deemed a penalty or liquidated damages? The authorities have not been uniform nor consistent in determining the line of separation. Great importance should be given to the meaning and intention of the parties. That intention, however, need not be deduced from the language of the written instrument alone; but the subject-matter and surroundings may be considered. Hence a sum expressly stipulated as liquidated damages will be relieved against, where it is obviously to secure the payment of another sum capable of being compensated by interest. So on the other hand a sum denominated a penalty or forfeiture will be considered liquidated damages where it is fixed upon by the parties as the measure of the damages, because the nature of the case, the uncertainty of the proof, or the difficulty in establishing the measure of damages, have induced them to make the damages a subject of previous adjustment. *Streeper vs. Williams*, 12 Wright, 450; *Powell vs. Borroughs et al.*, 4 P. F. Smith, 329; *Pearson's vs. Williams' Administrators*, 26 Wendell, 630. This last case is very similar to the one under consideration. Williams sold to Pearson certain lots. Pearson, by writing under seal, covenanted to erect by a day specified, on some part of said lots, two brick houses, or in default thereof, to pay said Williams on demand after the day specified, the sum of four thousand dollars. It

was held, that the plaintiff was entitled to recover the specified sum as liquidated damages.

In the bond executed by Snyder the sum specified is not stated as a penalty, either in the obligatory part or in the condition. In the latter it is expressly stated to be liquidated damages. The extent of the injury sustained by the plaintiff, through a failure of the defendant to fulfil the contract, is very uncertain. It would be extremely difficult to prove. The amount specified is not large. It is not such a gross sum as usually indicates a penalty. Upon the other hand, it clearly indicates a sum which the parties have agreed shall fix and determine the legal liability of the defendant, irrespective of what the actual damages might be.

Holding then that the damages are fixed and liquidated, the rule is made absolute.

Silas W. Pettit, Esq., for plaintiff.

E. S. Harlan, Esq., for defendant.

[Leg. Int., Vol. 30, p. 46.]

In the matter of the application of sundry citizens for the Charter of Incorporation of the "TARA BENEVOLENT SOCIETY" OF THE CITY OF PHILADELPHIA.

The Supreme Court will not approve a charter.

Quære: As to their authority under the new constitution.

Per curiam. January 26, 1874.

We decline to take jurisdiction of this application for the present. The original jurisdiction of the Supreme Court is distinctly defined in the 30th section of the 5th article of the new constitution. It declares "they shall have original jurisdiction in cases of injunction where a corporation is a party defendant, of *habeas corpus*, of *mandamus* to courts of inferior jurisdiction, and of *quo warranto* as to all officers of the Commonwealth, whose jurisdiction extends over the State, *but shall not exercise any other original jurisdiction.*" The 21st section also declares, that "no duties shall be imposed by law upon the Supreme Court or any of the judges thereof, except such as are judicial, nor shall the judges thereof exercise any power of appointment except as herein provided." None is provided, so that the prohibition is absolute.

The power to grant charters of incorporation is not included in the cases of enumerated jurisdiction. What the nature of the power to incorporate is, and whether it is excluded by the operation of the 3d and 21st sections, or either, we are not disposed to determine now, in an *ex parte* proceeding, without the aid of our two absent brethren, and a full argument by counsel, upon a rule to show cause.

As to the instrument before us, it may be proper to say, that in the case of the *Alexander Presbyterian Church*, 6 Casey, 154, this court objected to approving a charter written on several sheets of paper and sewed together. This one is put together with eyelets only, and a sheet could be as easily removed and another substituted before recording, as in the case of sheets sewed together with thread.

The provision for future membership should be restricted to citizens of the State.

This instrument is therefore declined, and an approval of the charter withheld for the present.

[Leg. Int., Vol. 30, p. 60.]

HOUGHTON vs. ROWLEY.

An exclusive privilege to supply the licensor with articles to be manufactured upon a patented machine, under a license described as "personal," will not authorize the licensee to arrange with others for the manufacture and supply.

Exceptions to master's report.

This was a bill by a licensee of a patent, having the exclusive privilege of supplying the licensor with the articles manufactured upon the patented machine, so long as he should be able and willing to supply them as needed, at prices as low as those whereat the licensor could obtain similar ones elsewhere, and averring that the licensor was about to manufacture the said articles (screw-rings for fruit jars) on the said machine, and had hindered and prevented the plaintiff from supplying the rings by fraudulently representing that the plaintiff had not such exclusive privilege, and was interfering with his arrangement with third persons, and so rendering the plaintiff's performance of his undertaking difficult or impossible.

The license itself, and so much of the contemporaneous agreement, giving the exclusive privilege, as bore upon the case, were as follows:

"Whereas, Thomas Houghton, of Philadelphia, Pennsylvania, did apply for letters patent of the United States, for making screw-rings for fruit jars, the oath of invention in the said application bearing date December 3, 1867, and the said application having been declared to interfere with those of F. Doelbor and J. L. Mason for like inventions;

"And whereas, the said Thomas Houghton hath assigned all his interest in and to the said invention, and in and to any and all patents which might be granted for the same to S. B. Rowley of Philadelphia;

"And whereas, the said Houghton is desirous of acquiring certain rights and privileges under any and all letters patent which may be granted for the said invention:

"Now this indenture witnesseth, that for and in consideration of the premises, I have granted, and by these presents do grant, to the said Thomas Houghton, his heirs and assigns, the exclusive right and privilege of making and using as many machines as he may desire for making screw-caps of any kind, or any other article, excepting screw-rings, for use upon, or which may be used upon fruit jars."

And the said Rowley further grants to the said Houghton the exclusive privilege of manufacturing upon the said machine screw-rings for fruit jars for him, the said Rowley, and for no party or parties whatsoever, from and after the first day of January, A. D. 1870, for and during such time as the said Houghton shall continue able and willing to supply the said rings in such quantities and at such times as they may be needed, and at prices as low as the said Rowley might be able to obtain similar rings in like quantities elsewhere, the said exclusive right being personal to said Houghton, and to cease and determine when he, the said Houghton, shall fail to faithfully keep and perform each and every of his stipulations as to the manufacture and supply of the said rings.

The section of the agreement bearing upon the matter in dispute was as follows:

"Third. The said Rowley doth covenant and agree to and with the said Houghton, that from and after the first day of January, A. D. 1870, the said Houghton shall have the exclusive privilege of supplying the said Rowley with screw-rings, made substantially after the manner of the specimens annexed to these presents, and marked 'A,' so long as he, the said Houghton, shall be able and willing to fully and promptly supply the said rings in the quantities and at the times they shall be needed, and at prices as low as those whereat the said Rowley may be able to obtain similar rings in like quantities elsewhere; and the said Rowley doth hereby covenant and agree, that he will grant to the said Houghton such license and privilege as shall be necessary to enable the said Houghton to manufacture the said rings for, and to supply them to him, the said Rowley, for use upon fruit jars, and to manufacture screw-caps and sell the same to any party or parties whatsoever for uses other than for fruit jars; and the said Houghton shall not, and he hereby for himself, his heirs, executors, administrators and assigns, covenants and agrees that he or they will not manufacture or supply the said rings, or cause or allow them to be manufactured or supplied for use upon, or which may be used upon fruit jars, to any other party or parties other than the said Rowley, unless by and with the consent of the said Rowley first had and obtained in writing; and the said Rowley, on his part, furthermore covenants and agrees, that so long as the said Houghton shall faithfully keep and perform each and every of the stipulations by him made, or hereafter to be made, in reference to the manufacture and supply of the said screw-rings, he, the said Rowley, will not exercise his right and privilege of manufacturing the same, or of causing them to be manufactured by any party or parties other than the said Houghton."

The cause was referred on bill, answer, and proofs, to George M. Dallas, Esq., as master, and it having been contended before him by the defendant, that the plaintiff was not able to supply the rings, except by employing other manufacturers to make them for him (the fact was subsequently so found by the master), it was urged on the part of the plaintiff, that the term of the license and agreement would be answered by such arrangement, and that there must exist a right to have the rings manufactured by others, and it was argued:

1. "Personal" does not mean "individual." The machine must be put in some one's hands, and as well in those of agents as of servants. The phrase "sub-contract" assumes the question.

2. The grant is sufficient, the qualification being coupled with the condition for the performance of stipulation as to "manufacture and supply," and the contract contemplating it: "or cause or allow them to be manufactured or supplied for use." As the plaintiff had the right of placing the machines wherever he saw fit, nothing is gained the defendant by his construction; whilst the other construction is ruinous to the plaintiff.

3. If there be a doubt equity will not support a forfeiture. A licensee is protected in equity from forfeiture by acts under mistaken construction. *Wilson vs. Sherman*, 1 Blatchford, 538. And one may justify under authority of license. *Brower vs. Hodges*, 22 L. J. (N. S.) C. B. 194, 3 Res. in *Crogate's case*. In *Dark vs. Johnson*, 5 P. F. Smith, 171, there were seventeen leases which were supported.

4. The defendant having refused to accept rings from the plaintiff except upon terms found by the master to have been fraudulent, a tender was not necessary.

And there being no proof of the "quantity needed," or notice to plaintiff that any quantity was required, no inability on the part of the plaintiff can be inferred. *Whister vs. De La Tour*, 2 E. & B. 678, 22 L. J. 455, Q. B.; *Frost vs. Knight*, Ex. Ch., V. American Law Times, 148.

5. The defendant's acts showed his construction to be the same as plaintiff's. And the master having found that defendant fraudulently prevented the plaintiff from making contracts with others for the supply, it is too late to insist that no such right existed. And this is specially so where the absence of the right is set up to create a forfeiture.

For the defendant it was submitted, that the licensee had no right to employ others to manufacture the rings for him.

1. This would have been so as the result of the omission of the word "assigns" or its equivalent. *Thomas vs. Sorrell*, Vaughan, 351; *Dark vs. Johnson*, 5 P. F. Smith, 171; *Brooks vs. Bryan*, 2 Story C. C. 525, 543; *Troy Iron and Nail Factory vs. Corning*, 14 Howard, 216; *Rubber Company vs. Goodyear*, 6 Wallace, S. C. Reports, 788. And this omission is the more significant, as it is used in the other grant in the same license. What the plaintiff had undertaken to do was to sub-contract with other manufacturers.

2. It having been expressly made "personal," all of the qualifications and limitations of a personal license, such as the personal confidence, etc., were annexed, *ex vi termini*, to this grant.

3. The exclusive privilege of supply only extended to rings manufactured on this machine, and as no one else had the right to use the machine, the right to supply could not enlarge the license to use the patented machine.

4. The real object of the contract was to secure to plaintiff a manufacturer's profit, not to subject defendant to a middleman's commission, and to allow him to protect himself by soliciting proposals in the open market.

The master's report upon this point was as follows:

"It is clear, as already appears in the statement of the facts of the case, and as the plaintiff's argument upon one point admits, that the plaintiff did not intend to confine himself merely to the employment of workmen or agents to assist him in the manufacture of rings for the defendant, but proposed to contract with other independent manufacturers for the manufacture of the rings by them, and that he relied upon them (at least to a considerable extent) to enable him to furnish the rings to the defendant. It is true that he, and not those he thus relied upon, would be responsible to the defendant for the delivery of rings of the right kind, in sufficient quantity and at proper times; but it is no less true, that in thus procuring others to make the rings he would not be exercising 'the exclusive privilege of manufacturing' for the defendant, but of selecting the persons who should manufacture for him, and that the profit which plaintiff would thus realize would not be that of a manufacturer, but the commission of a broker between the real manufacturer and the defendant, which the latter would really have to pay in addition to the price of the articles. The master does not think that it

was the intention of these parties in making the agreement and license of February 17, 1869, to give to the plaintiff the right to make any such profit; but that the license to the plaintiff was granted in pursuance of the agreement, and for the purpose of enabling him to manufacture for the defendant, and to realize the fair profit of a manufacturer, and no other.

"The general tenor of the agreement and license when read together, as they should be, support the view here taken, and the words, 'the said exclusive right being personal,' seem to have been inserted in the license for the very purpose of rendering any doubt upon this subject impossible.

"The agreement of the parties vested in the defendant the exclusive right to the patented machine, subject only to his covenant, contained in section 3d of that agreement, that from and after the first day of January, 1870, the plaintiff should have the exclusive right to supply the defendant with rings, for which purpose the defendant undertook to grant to the plaintiff 'such license and privilege as shall be necessary to enable the said Houghton to manufacture the said rings for, and to supply them to him, the said Rowley.' Surely this was an undertaking to license the plaintiff to manufacture, in order that he might, *by that means*, supply the defendant, and the license that was granted followed precisely, as has been shown, this view of the agreement. But it has been contended that this construction is inconsistent with the provision in the agreement that the plaintiff should 'not manufacture or supply the said rings, or cause, or allow them to be manufactured or supplied . . . to any other party or parties than the said Rowley.' The master is, however, of the opinion that the previous direct language of the contract upon this point, and the evident purpose and intent of the parties as thereby expressed, should not be controlled by giving to the words, 'or cause or allow,' as above used, the force thus sought to be attached to them. It is evident that they were not used for the purpose of extending or enlarging the privileges of the plaintiff, but rather to restrict and limit them. Their use at all was unnecessary; they were evidently inserted without much thought, but in abundance of caution, with the mistaken notion that they would, in some way, tend to more closely bind the plaintiff in the particular to which alone they have reference, and that they should not now be so interpreted as to add to the rights of the license.

"Moreover, these words (cause or allow) as they occur in the sentence under consideration, relate to 'supply' precisely as they do to 'manufacture,' and to hold that they extend the plaintiff's rights so as to enable him to have the rings *manufactured* for defendant by others, it would be necessary also to maintain that plaintiff might have them *supplied* by others, which will hardly be contended.

"The closing provision of the agreement is, that so long as the complainant should comply with his stipulations in reference to the *manufacture* and supply, the defendant would not manufacture himself, or cause the rings 'to be *manufactured* by any party or parties other than the said Houghton.' That *he* was to manufacture, and not to procure others to do so, is evident from every portion of the agreement that throws any light upon the subject, and the language of the license, as already

considered, even more strongly indicates that such was the intention of the parties.

From the construction of the agreement and license which the master has arrived at in the particular just considered, two results appear necessarily to follow:

"1st. That at the time of filing his bill the plaintiff was not, and had not been 'able,' in the sense in which that word was used in the license, to supply the rings in quantities and at the times needed in the defendant's business; for, as has already been found as a fact, and as plaintiff's own case required him to admit, he relied largely, if not wholly, upon other manufacturers to supply them; and

"2d. That the defendant's interference with plaintiff's arrangements to have other manufacturers make the rings (whether defendant so interfered through mistake as to plaintiff's rights, or as a precaution to meet every possible contingency) caused no injury to plaintiff, since he had no right to make any such arrangements.

"Taken, together these two propositions amount simply to this: That the plaintiff was not ready to supply the rings, according to the terms of the license to him, and that the fact that he was not so ready is not chargeable to the defendant."

Opinion delivered *February 8, 1873*, by

SHARSWOOD, J.—It has not been seriously maintained on the argument upon these exceptions, that if the construction placed by the master upon the agreement and license of February 17, 1869, is the right one that the conclusion at which he has arrived is wrong. Taking both instruments together, I agree that Houghton's exclusive privilege to manufacture the rings for and to supply them to Rowley was "personal to Houghton," which he could not assign to any other party, and it follows that he could not arrange with others to manufacture screw rings "made substantially after the manner of the specimens annexed," so as in that way to enable him to supply Rowley. If this be so, it is clear that Houghton, in point of fact, was not able to comply with the contract, and there was a failure on his part, in consequence of which, his right by the terms of the license ceased and determined.

Exceptions dismissed and bill dismissed with costs.

E. L. Boudinot and J. Vaughan Darling, Esqs., for plaintiff.

Samuel Dickson and J. C. Bullitt, Esqs., for defendant.

[Leg. Int., Vol. 30, p. 60.]

**THE PHILADELPHIA TRUST, SAFE DEPOSIT AND INSURANCE COMPANY
vs. THE FAME INSURANCE COMPANY.**

A contract of reinsurance is a contract of indemnity, and the reinsured may go into equity as soon as the claim arises upon him, without waiting to pay the original insured.

Hearing on bill and demurrer.

The bill alleged that plaintiffs were the assignees of the Enterprise Insurance Company, in trust for the benefit of its creditors; that the defendants entered into an agreement with the Enterprise Insurance Company, by which they agreed to reinsure them, in some cases to exonerate them from all losses, and others to contribute to payment of losses

in certain proportions; that a large amount of property insured by the Enterprise Company had been destroyed which was covered by the reinsurance, but plaintiffs could not estimate the amount absolutely; that plaintiffs being necessarily unacquainted with the details of the business, had requested defendants to account to them; that they were desirous to produce the proofs of loss received from the persons who allege that they have sustained damage by fire, and that defendants be required to produce their books containing entries of such reinsurance; that the demand for exoneration from and contribution towards payment of said losses is cognizable and determinable by a court of equity, and from the complicated nature of the adjustments, etc., it would be impossible for plaintiffs to procure adequate redress at law, and prayed the court to decree:

1st. That the defendants should exonerate and discharge them as such assignees from the one class of risks, and properly and rateably contribute towards the payment of the losses in the others.

2d. That the case be referred to a master to state an account, before whom both parties should produce their books.

Defendants demurred because the bill did not allege anything that entitled plaintiffs to relief in equity or for discovery; or that discovery is indispensable; or that they were unable to prove the facts without such discovery; that they had not shown mutual accounts or dealings, or complicated accounts; that they did not allege payment of losses by themselves or their assignor.

Plaintiffs' counsel cited *Champion vs. Brown*, 6 Johnson Ch. R. 406; *Ramlagh vs. Hayes*, 1 Vernon Rep. 189, 2 Ch. Cases, 146; *Herchrath vs. American Ins. Co.*, 3 Barb. Ch. 63; *Miller's Appeal*, 11 Casey, 481; *Fowle vs. Laurason*, 5 Peters, 495; *Story's Eq. Jur.*, vol. 1, sec. 73, 456, 459; 1 Emer., *Traite des Assur.*, ch. 8, sec. 14, *Case Marseilles*, 1748.

The defendants' counsel contended that there was no contract between the Fame and the original insured. There was no liability to them. The moneys which may be paid by the Fame must be paid to the Enterprise, and the original insured have no interest, either in the contract with the Fame, or the moneys paid thereon, different from all the creditors of the Enterprise. *Marshall on Ins.*, 141; *Phillips on Ins.*, vol. 1, 226; *Herchrath vs. American Ins. Co.*, 8 Barb. Ch. 63; *Carrington vs. Commercial Fire and Marine Insurance Company*, 1 Bosw. 152. That the defendants in no case were wholly to exonerate and discharge the Enterprise, and the case in no proper sense comes under head of contribution. *Deering vs. Earl of Winchelsea*, 1 Cox, 321; *Sterling vs. Forester*, 3 Bligh, 590. As to discovery and accounts, see *Story Eq. Pl.*, sec. 313, 288 and 476; *Phillips vs. Phillips*, 9 Hare, 473; *Moxen vs. Bright*, Law Rep. 4, Ch. App. 292; *Porter vs. Spencer*, 2 John. Ch. R. 169; *Pearl vs. Corporation of Nashville*, 10 Yerger, 179; *Foley vs. Hill*, 2 H. L. Cases, 28; *Dinwoodie vs. Vailey*, 6 Ves. 136; *O'Connor vs. Spaight*, 1 Sch. & Lef. 309; *Fowle vs. Laurason*, 5 Peters, 502; *Gloninger vs. Hazard*, 6 Wr. 400.

Where there is the ordinary policy of reinsurance the reinsured can collect from the reinsurer before payment to the original insured, and though the company reinsured becomes insolvent, the reinsurer is not released from payment in full by reason thereof, but to sustain his

demand the reinsurer is at the peril and risk of making the same legal proof of the existence and extent of the loss as the original insurer would have to make to recover on his policy. *Hastie vs. De Peyster*, 3 Carnes, 190; *Hone vs. Mutual Ins. Co.*, 2 Coms. 235; *N. Y. Central Ins. Co. vs. Protection*, 3 Barb. Ch. 163, S. C.; 1 Story C. C. 458. The specific contract, such as is the present, that the reinsurer should pay on proof of payment by the reinsured, is, however, referred to by Kent, C. J., in *Hastie vs. De Peyster*, and Story, J., in *Ins. Co. vs. Protection*, and such special contracts come not under the above rules. It is derived from the French and is commented on by Boulay Paty, *Traite des Assurances*, Chap. XI., 341, etc.

Opinion delivered February 8, 1873, by

SHARSWOOD, J.—I think there is authority which sustains the jurisdiction of a court of equity in a case of this kind. A contract of reinsurance is a contract of indemnity. The reinsured may go into equity, as soon as the claim arises upon him, without waiting to pay the original insured. I do not understand this to be denied by the learned counsel for the defendants. But he maintains that it is not applicable to their case, because, by the express terms of the contract, "The losses, if any, are to be payable *pro rata* to the Enterprise Insurance Company, at such times and in such manner as the latter company may pay." This clause must have such an interpretation as will not entirely defeat the contract. It can evidently have no application, where, as in this case, the Enterprise Company have made a general assignment for the benefit of their creditors. If the assignee can only recover from the defendants, when and as he pays dividends of the assigned estate to the original insured, it is plain an endless number of suits must be the consequence, and if it had so happened that there was no assigned estate, there could be no recovery at all. I would construe the words, "as the latter company may pay," to mean "as the latter company may be liable to pay." It meant that the Fame Company should have all the advantages of the Enterprise Company, as to the time and manner of payment, that they should not be called on to pay on the immediate happening of the loss, but whatever conditions as to the time and manner of payment, might be annexed to the original policy should be extended to them.

Demurrer overruled.

R. L. Ashhurst, Esq., and *Hon. Wm. A. Porter* for plaintiff.

Charles S. Pancoast, Esq., for defendant.

[Leg. Int., Vol. 31, p. 5.]

JOHN RICE, Trustee, vs. SOUTHERN PENNSYLVANIA IRON AND RAILROAD COMPANY.

1. A master cannot go behind the decree of foreclosure in distributing a fund raised by the sale. He must distribute it to the parties entitled under the decree.
2. Where there is no residue after the bondholders and lien creditors are satisfied, stockholders have no interests that need consideration.
3. The master should consider and settle the titles of adverse claimants to bonds.
4. A mortgage made to secure the payment of certain bonds is made for the benefit of the bondholders only, and no one can have an interest in the mortgage except as a bondholder.

5. Creditors cannot inquire into the good faith of a transaction by the company, unless it covers a fraud intended to affect them.
6. An auditor has no power to open or set aside a judgment. To him it is conclusive, and if creditors would attack it, they must resort to the proper court for that purpose.
7. Where bonds are pledged as collateral, the holders have a right to receive the full amount of the bonds, and not only the face of their claims with interest, unless subsequent creditors can show a resulting interest in their debtor. The holders must be left to account to their principal for any balance that may be over the amount due to themselves.
8. A bond of this character, though not a technically negotiable paper, is practically so for all purposes of commerce. They pass by delivery, and may be sued by the holder in his own name. The burden of proof, therefore, is upon the party who alleges that they were not received in the ordinary course of trade, and for a valuable consideration.
9. An act of an officer of a corporation, afterwards ratified by the board of directors, becomes by such ratification the authorized act of the corporation.

Exceptions to master's report distributing fund raised upon a sale of the property of the corporation defendant under the foreclosure of a second mortgage. The Southern Pennsylvania Iron and Railroad Company, having purchased certain bonds from Daniel V. Ahl, prior thereon, \$50,000 in cash, and \$50,000 in first mortgage bonds, and further agreed to give him eighty of two hundred second mortgage bonds for \$1000 each, to be thereafter made and executed.

After the second mortgage bonds were executed, eighty of them were respectively tendered to Ahl, and he persistently refused to accept them, because two judgments for \$33,000 each, which were prior liens, had been confessed by the company.

The eighty bonds refused by Ahl, together with other second mortgage bonds, were afterwards issued and delivered to Richmond L. Jones, as collateral security to protect him and others for money loaned to the company. Large amounts of the money so loaned were obtained by the individual indorsements of Jones and others, and the said bonds were put up as collateral by Jones with the parties from whom the money was borrowed. The face of the bonds, which was made good by the amount realized at the sale under the foreclosure of the mortgage, was in excess of the debts for which they had been pledged by Jones, though less than the indebtedness of the company to him.

These bonds were presented to the master for payment by the parties with whom Jones had pledged them as collateral, who claimed payment in full to them.

Daniel V. Ahl, although he had no bonds, claimed the right to receive the amount of the fund belonging to eighty of those bonds, notwithstanding his refusal to take them upon the ground that the company had covenanted to issue them to him under the agreement above referred to.

John Rice held a judgment against said company for \$125,000, the lien of which was subsequent to the second mortgage.

Opinion delivered December 26, 1873, by

GORDON, J.—Adopting the principle developed in the case of *McElrath vs. The Pittsburg and Steubenville Railroad Co.*, 18 Smith, 37, that the master, in a case like the present, cannot go behind the decree of foreclosure to ascertain the *bona fides* of the parties to the

mortgage, but is limited to a distribution of the fund raised by the sale, we cut off many of the exceptions to the master's report, and also much of the testimony as irrelevant.

Thus, it matters not in the present inquiry, that Jones' contract for the construction of the road should have been \$400,000 instead of \$600,000, that the stock subscriptions were gotten on false representations, or that Mr. Ahl was to get too much or too little for his land; or that through misrepresentation he was induced to exchange a good security for one that was worthless. None of these things, nor the intention of the directors in executing this mortgage, can now be inquired into; the day for this has gone by. What remains for us to do is simply and only to distribute the fund among those to whom of right it belongs. As there will be no residue after the bondholders and lien creditors are satisfied, it is clear that the stockholders have no interests that need consideration.

Undoubtedly the master should consider and settle the titles of adverse claimants to the bonds. Hence we may first consider the exceptions of Daniel V. Ahl, who alleges that the master erred in not awarding to him the proceeds of some eighty of these bonds, or rather the sum of \$80,000 produced by the sale under the mortgage. If we understand the general idea contained in his exceptions, it is that the second mortgage was made chiefly for the purpose of securing to him the balance of the purchase money resulting from his sale of lands to the company, and that therefore he had a vested right in the mortgage from the date of its execution, that the tender of the bonds was only a recognition of his pre-existing right, and that his refusal to accept of them did not either extinguish or weaken that right. But we hold this position to be untenable in this, that the mortgage was executed not to secure his purchase money, but to secure 200 bonds of \$1000 each. How could the agreement of the company to give him eighty of these bonds create a specific lien in his favor in the mortgage itself? Suppose the bonds had never been tendered to him, that the company in violation of their agreement had refused to deliver them to him, could he nevertheless have recovered his \$80,000 through a *scire facias* on the mortgage? We think not. It does seem to us that in such case the remedy must lie either in covenant upon the agreement, or in a bill to rescind that agreement and restore him to his rights under his former contract. We are at a loss to discern, as alleged by his very eminent counsel, how his case is bettered by his steadfast and persistent refusal to accept of these bonds. It looks to us that this was a fatal mistake that is now past remedy. It is no doubt true that the company acted in bad faith, in permitting the judgments Nos. 203 and 204, August term of the Common Pleas of Franklin county, to precede the execution of the mortgage, but neither does this help Ahl's status with reference to that mortgage.

It is then to us clear that the master was right in refusing to let him in upon this fund.

We turn next to the exceptions of John Rice. He complains of the master's ruling in that he allowed the full face of the claims of Augustus F. Boas, and the Farmers' National Bank of Reading (the two judgments already referred to), because these claims were in part made up

of usurious interest; in other words, that these judgments were purchased by the claimants at a usurious discount from one A. L. Boyer, a broker of Reading, to whom they had been executed by the company for the purpose of discount. Now whether these were *bona fide* purchases from Boyer, or were taken with the knowledge that they were confessed to him without consideration, and for the mere purposes of sale, matters not. Creditors cannot inquire into the good faith of the transaction, unless it covers a fraud intended to affect them. On this the authorities cited by the master are full and to the point. It is also settled that an auditor has no power to open or set aside a judgment. To him it is conclusive, and if creditors would attack it, they must resort to the proper court for that purpose.

The next exception by Mr. Rice presents the complaint that the master should only have allowed to the Reading Savings Bank, Bushong & Bros., and the Kensington National Bank, the face of their claims with interest, and not the full amount of the bonds which they hold only as collateral security. No doubt this would be so, were these collaterals held directly from this iron and railroad company, or from Jones, as their agent. But as the master has found, and we think rightly from an examination of the testimony, that these bonds were issued to Jones for his own security, as well as that of others in raising money for the purposes of this company, and that he will not be paid by the bonds which he received and deposited with these parties, we cannot, under such circumstances, regard the equity of subsequent creditors as superior to that of Jones, and must therefore leave these bondholders to account to their principal for any balance that may be over the amount due to themselves. With reference to the bonds held by the Allegheny National Bank, no such circumstances have appeared as would throw upon them the burden of proof of showing that they received them in the ordinary course of trade, and for a valuable consideration. These bonds are made payable to bearer, they pass by delivery, and may be sued by the holder in his own name, so that, though not technically negotiable paper, they are practically so for all purposes of commerce.

We cannot, therefore, upon the mere motion of a disappointed creditor, compel the holder of such bonds to prove that they were obtained from the company for a valuable consideration.

Next come the three bonds held by Henry M. Keim. It is not denied that the company received full consideration for these in the way of his services as secretary. But it is alleged that the treasurer had no authority from the board of directors to issue them. We might answer this exception by directing attention to the fact, that the company has found no fault with that act, and it behooves not a stranger to call it in question; nevertheless, whether the acts of the treasurer in this matter were authorized or not, at or before the time they were transacted, they were acquiesced in by the directors, and thus ratified. *Kelsey vs. Bank*, 19 P. F. Smith, 429.

We deem it unnecessary to dwell upon the remaining exceptions, as they are substantially disposed of in what has already been said. In conclusion, we think the master has properly disposed of the fund in controversy. Report confirmed; decree to be entered accordingly.

Hon. *F. Carroll Brewster* and *Samuel G. Thompson, Esq.*, for John Rice, trustee.

Charles Henry Jones and *George W. Biddle, Esqs.*, for the railroad and Richmond L. Jones.

George F. Bear, Esq., for the Reading creditors.

Wm. McLellan, Wm. S. Stenger, David W. Sellers, and Jeremiah S. Black, Esqs., for Daniel V. Ahl.

Alexander K. McClure and *James Thompson, Esqs.*, for John Rice, creditor.

Alexander D. Campbell, Esq., for Kensington National Bank.

Charles Henry Jones, Esq., for the Allegheny National Bank.

[*Leg. Int.*, Vol. 31, p. 78.]

WILLIAMS vs. THE PENNSYLVANIA RAILROAD COMPANY.

Since the act of April 8, 1871, a foreign executor can transfer stock, and the company is not obliged to see that the will gives the executor the power to assign or dispose of the stocks; it is to be presumed that it does.

Sur bill and answer. Opinion delivered *January 30, 1874*, by SHARSWOOD, J.—It was decided in *Alfonso's Executors' Appeal*, 20 P. F. Smith, 347, that the executors of a decedent whose domicile at the time of his death was not in a sister State, but in a foreign country, could not by virtue of letters testamentary granted in such foreign country transfer stocks in Pennsylvania. It was no doubt in consequence of this decision that the act of April 8, 1871, Pamph. L. 44, was passed. This act authorizes such transfer "whenever a duly authenticated copy of the will, or other grant of authority under which such transfer is proposed to be made, shall have been filed in the office of the register of wills of the county" in which is the transfer office or principal place of business of the corporation whose stock it is proposed to transfer. It is contended, however, that it is still the duty of the corporation to see that the will gives to the executor the power to assign or dispose of the stocks. *Bayard vs. Farmers' and Mechanics' Bank*, 2 P. F. Smith, 232, is relied on. The will of John Williams, in the case now under consideration, specifically bequeathed his shares in both foreign and English railways and other companies to trustees, giving them full and exclusive power of selling and converting the same into money. These trustees, who were also named as the executors, formally renounced their offices both as trustees and executors, and letters of administration with the will annexed were granted to the plaintiff. I do not consider that the declaration in the will that the trustees shall have the exclusive power of selling and converting the stock, in the least affects the question. It is after all nothing but a specific bequest of the stock, and nothing appears to be more clearly settled, than that such a specific bequest does not impair the right of the executor or administrator with the will annexed to dispose of the subject-matter of the bequest. The primary duty of an executor or administrator is administration. He is to pay debts, and may use specific legacies for that purpose, if necessary. The corporation has no means of ascertaining whether it is needed for that purpose. To require evidence would greatly delay and embarrass the executor or administrator in the discharge of his duties. This is the

doctrine of *Bayard vs. The Bank*, and however it may be when distinct notice of a breach of trust is given to the corporation, in the absence of such notice, I am quite clear in the opinion that the corporation is bound to permit the transfer.

And now, January 30, 1874, it is ordered and decreed that the defendants permit the plaintiff to transfer the shares of stock mentioned in the bill, and that the costs be paid by the defendants.

Wm. M. Tilghman, Esq., for plaintiff.

Chapman Biddle and Theodore Cuyler, Esqs., for defendants.

[*Leg. Int.*, Vol. 31, p. 252.]

COCHRAN vs. GOWEN.

An attachment will not be issued against a plaintiff in equity, who has failed in his suit, for his neglect to pay the costs of the suit.

This was a suit between a broker and his customer. The bill set forth that the defendant was a broker, and that the plaintiff employed him to buy and sell certain stocks, gold, etc., the plaintiff putting up margins to secure the defendant against losses. Several transactions were alleged to have taken place, as to which the plaintiff contended that the defendant had made false returns; and he prayed for an account and a decree for the return of his margins and profits.

The defendant answered that there had not been any gains, but that losses were made by the plaintiff; that the account had been stated by the defendant, received by plaintiff, and settled between them by the receipt of the balance therein stated to be due; and that the transactions between them were mere wagers upon the rise and fall of stocks, and therefore without the protection of the courts to enforce any rights arising therefrom.

The case was heard on bill, answer, and proofs, and the plaintiff's bill was dismissed with costs, whereupon the defendant, after demand for the costs, moved for a rule to show cause why an attachment should not issue as for a contempt in not paying the costs.

On the return of the rule the plaintiff filed an affidavit setting forth that he was unable to pay the costs due by him for want of means, he having neither money nor property out of which he could pay the amount due.

Thomas Hart, Jr., Esq., in support of the rule, contended that the act of July 12, 1842, abolishing imprisonment for debt, does not include the case of a claim for costs in equity, which he argued comes within the exception of the act, being a "proceeding as for a contempt to enforce civil remedies, in which case the remedies shall remain as heretofore;" and he cited and relied upon *Chew's Appeal*, 8 Wright, 247, and *Beidler vs. Howell*, 8 Phila. 273. The cases of *Scott vs. Jailer*, 2 Phila. 153, and *Lane vs. Baker*, 2 Grant, 424, he said had no bearing upon the point at issue.

Michael Arnold, Esq., and *Hon. F. C. Brewster* against the rule.

April 25, 1874, the court (SHARSWOOD, J.) refused to issue the attachment.

Orphans' Court, Philadelphia.

[Leg. Int., Vol. 29, p. 141.]

HUTCHINS' ESTATE.

Testator gave to his nephew an annuity of \$1000 during life, with a further provision that it should be paid to him in person only, on his personal application; and that if he should not so apply in five years, then such yearly sums uncalled for should fall into the residuary estate. The annuitant died just as he was starting on a voyage to claim his annuity, within the five years: *Held*, that the annuity was vested, and that the condition was a condition subsequent, made impossible by the act of God. The sums accrued were therefore awarded to the annuitant's administrator.

Opinion delivered *April 27, 1872*, by

LUDLOW, J.—Mason Hutchins, by an item in his will, provided as follows:

"Item.—I give and bequeath unto my nephew, Mason Hutchins Darrach, an annuity of one thousand dollars, chargeable upon and yearly payable out of my estate, for and during the term of his natural life, and I do further order and direct, that the said sum shall be paid to him in person only, and upon his personal application therefor, and to no other person for him; and in case the said Mason Hutchins Darrach shall not for the space of five years apply in person for the payment of the said yearly sum after the same shall become due, then I order and direct each and every such annual sum uncalled for shall revert to and become a part of my residuary estate."

Subject to the above annuity, the testator gave the rest, residue, and remainder of his estate to the St. Joseph's Hospital. The annuitant within five years intended to start for Philadelphia from California, and died before he commenced the journey; the question now to be settled is, to whom do the several sums, payable yearly, and never demanded by the annuitant in person, belong, to his representatives or to the residuary devisee?

The answer to this question will depend upon the legal effect of the condition imposed: was it annexed to the gift, and of its essence, or was it a subsequent condition by which the annuitant took an absolute interest in the money, liable, however, to be divested should he fail to comply with it? If so, then the act of God having rendered the performance impossible, the condition becomes void, and the estate vests absolutely in the representatives of the annuitant.

The principal question to be decided is, what was the intention of the testator, and this intention is to be gathered from a consideration of the will; no authority need be cited in support of these principles. In the construction of this will it is to be observed, that the testator does not attach to the gift any condition, for he declares: "I give and bequeath unto my nephew, M. H. D., an annuity of one thousand dollars," etc. Then, as if to be satisfied of the existence of his nephew, or possibly to prevent him from selling his interest in the estate at a sacrifice, or to enable the payment of the yearly sum or sums to be made to the person

thoroughly identified as his nephew, he directs that he shall apply in person for payment, and that only in person shall he be paid. The main idea seems to have been, not a desire to postpone the vesting of the estate, nor even the time of payment, but only the *method* of payment.

The only theory which can be suggested against this construction is the fact that there is a limitation over; but it is to be noted that even this limitation is not specific. The fund uncalled for shall simply form a part of the residuary estate.

So much may be said as to the general intention of the testator, and from what has been already said, it may be affirmed with confidence that the reading of the will by no means indicates a general intention that the estate shall not vest upon the death of the testator.

A number of authorities have been submitted to us from which it has been ably argued that the condition was of the essence of the gift, or in other words, unless the nephew appeared the estate did not vest, and it is conceded that if the condition is a precedent one the act of God will not render it void.

A careful examination of each of the cases develop the fact, that in no one of them was an annuity the subject of the gift, and that in each a specific legacy was given, and the condition was of the essence of the gift. See *Bertie vs. Falkland*, 1 Salk. 231, Swinlib., p. 4, 36; *Rowndel vs. Curret*, 2 Bro. C. C. 67; *Talk vs. Houlditch*, 1 Ves. & B. 248.

Even in *Burgess vs. Robinson*, 3 Mer. 7, the devise was of a freehold charged with the payment of £200 to each of testator's nephews, to be paid as soon after his decease as they should arrive in England and claim the same, provided such claim should be made in the first three years after his decease. One of the nephews arrived in England after the three years, in ignorance of the will, and of the testator's death. Sir Wm. Grant held that the nephew, although ignorant of the facts, was not entitled to the legacy.

We distinguish this case from the present one, in that the condition was annexed to the gift—in this will there is an absolute and unqualified gift of the annuity. In *Burgess vs. Robinson* the claim was to be made as a precedent condition, and was inseparably connected with its payment; here the gift is absolute, and only the method of its payment is indicated.

The same criticism will we think apply to *Hawkes vs. Baldwin*, 9 Sim. 355, for in that case a claim was first to be made.

Our two Pennsylvania cases—*Chambers vs. Wilson*, 2 Watts, 495, and *Campbell vs. McDonald*, 10 Watts, 179—are clearly cases in which conditions precedent existed: in the first the estate did not vest unless the nephews or nieces came within six years from Ireland; in the last the court of Washington county was to be satisfied as to the identity of the heirs.

In this will the testator does not declare that the annuity shall become the property of his nephew when he appears in person, or as soon as he arrives in this city, and makes a claim, or even a demand for it—he gives to him the annuity as absolutely as is possible, and when the nephew demands in person its payment, then the method is pointed out by which the executors shall be discharged of their liability,

or, as was argued, the condition is of the essence of the payment and not of the gift.

We do not think it necessary to enter into any discussion as to a supposed difference in principle between an annuity and a legacy, except to say, that there is a striking analogy between this case and the class of cases in which it has been firmly settled, that where a legacy is given and a contingency attaches, not to the legacy, but to the payment alone, the legacy vests.

On the whole we are of the opinion that the condition contained in this will was a condition subsequent; that its performance became impossible by the act of God, and that the estate vested at the death of the testator, and was never divested because of the act of God.

The fund therefore belongs to the administrator of Mason H. Darrach, and must be paid to him by the executor of Mason Hutchins, deceased.

T. Bradford Dwight, Esq., of counsel for administrator of M. H. Darrach.

Peter McCall, Esq., of counsel for executor of Hutchins.

[Leg. Int., Vol. 29, p. 149.]

ESTATE OF HARRISON T. DESILVER, DECEASED.

A surety upon an ordinary lease continuing from year to year, gave three months notice in writing to the landlord, that at the expiration of the then current year he would not any longer be responsible for rent: *Held*, that at the expiration of that year he was discharged from any further liability.

Sur exception to auditor's report.

A statement of the facts of this case is given in the report of William D. Baker, Esq., auditor, as follows:

"Chapman Biddle, Esq., on behalf of 'Augustus J. Pleasonton and Chapman Biddle, surviving trustee under the will of Joseph Dugan, deceased, now for the use of the said Augustus J. Pleasonton, Chapman Biddle and Robert Toland, trustees under the will of Joseph Dugan,' presented a claim for \$795.26, with interest, under the following circumstances:

"One Emma Anderson, by a lease bearing date December 28, 1866, rented a tenement, No. 1220 Spruce street, from A. J. Pleasonton and Chapman Biddle, surviving trustees, for the term of twelve months from the 1st of January, 1867, at the rent of \$133.34 per month, payable on the last day of each month thereof, the first payment to be made on the last day of January, 1867. The lease contained the following clause:

"In case the lessee shall hold over and remain in possession of said premises after the expiration of said term, then said lessee shall be considered as tenant for another year, upon the same terms and conditions as are above specified, unless the lessors shall have given one month's previous notice of their intention to change said terms and conditions, and the lessee holding over after such notice shall be considered as lessee under the terms mentioned in said notice for so long a time as she remain in possession of said premises, without further notice."

At the foot of the lease, the decedent signed an agreement of even date with the lease, which is in the following words: "For value received

I do hereby agree to be responsible to the above-named lessors, their successors or assigns, for the true and faithful performance of the above-named contract on the part of Mrs. Emma Anderson."

Mrs. Emma Anderson continued to be the lessee of the premises during the year 1870, and for the month of January, 1871. She failed to pay the whole of the rent due for the month of August, 1870, there being due on the 31st of that month the sum of \$128.56, and the entire rent due for the months of September, October, November and December, 1870, and January, 1871.

This claim was resisted by the executors. On the call of the executors, the claimants produced a letter from the decedent to Mr. A. J. Pleasonton, one of the trustees, dated June 4, 1869, in which the decedent required him to collect all rent that might accrue thereafter from Mrs. Anderson, and notifying him that the decedent would not be surety after the then current year.

"The current year expired December 31, 1869. This letter was in reply to one sent by General Pleasonton to the decedent concerning the rent, but the executors were unable to find the original, and they called on the claimants to produce their copy, but they replied that they could find no copy of it. The decedent died September 10, 1870.

"Mr. Webster, counsel for the executors, objected to this claim on the following grounds:

"1. Because the lease is for one year certain, and as between the guarantor and the lessors, the guarantor was bound only for the first year, not having renewed his guaranty.

"2. The notice of June 4, 1869, that the decedent would not be responsible beyond the then current year, was a revocation of any contract of guaranty or suretyship that he might be under. And all the rent for that year having been paid, there can be no liability for the rent that subsequently accrued.

"After having a full argument on these points, and examining the authorities cited, the auditor adopts the second proposition and disallows the claim."

The exception filed to this report was as follows:

"The auditor has erred in deciding that there was a revocation of the contract of suretyship by which the decedent's estate was released from liability for rent accruing subsequently to the original term in not allowing the claim of the trustees under the will of Joseph Dugan, deceased, for the arrears due January, 1871."

The case came up for argument before Associate Judges Ludlow and Pierce, on Tuesday, April 9, 1872.

Opinion delivered *April 20, 1872*, by

LUDLOW, J.—The decedent, in his lifetime, became security for the payment of the rent of a tenant who had leased a certain property.

The lease is in the usual form for one year, and contains a covenant by which the lessee may hold over after the expiration of the term; she was to be considered a tenant for another year, upon the terms and conditions specified in the lease, and the lessor reserved the right on one month's notice to change the terms and conditions of the lease.

The first term, that is to say, the first year, expired, the tenant con-

tinued in possession, but in the third year the security gave ample notice to the landlord that he would not be responsible after the expiration of the then current term.

Desilver, the security, having died, this claim has been made against his estate. The precise point here presented has never been decided in this State, and we must be guided by analogy and general principles.

The true doctrine applicable to the subject undoubtedly is, "that no party shall be bound beyond the extent of the engagement which shall appear from the expression of the security, and the nature of the transaction to have been in his contemplation at the time of entering into it." Fell on Guarantee, p. 116; and the leading case upon the subject in England, *Arlington vs. Merricke*, 2 Saund. 403, was decided upon this principle, when it was held, that the general words of an undertaking were confined to the time specified in the recital. A distinction was taken in the *Warden of St. Saviour's vs. Bostock*, 2 N. R. 175, upon the ground that the condition of the bond in that case looked to something beyond the year, but the court decided otherwise.

It is also a settled principle in equity that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security, and to stand in the place of the creditor, and, says Ch. Kent, "this right of the surety stands not upon contract, but upon the same principle of natural justice upon which one surety is entitled to contribution from another;" 4 Johns. Ch. 129.

The document signed and sealed by these parties was clearly a lease for one year; after the expiration of the term it became a lease from year to year.

The tenant could at any time terminate the term at the expiration of any year, and the landlord could change the terms and conditions of the lease at his pleasure.

From the very nature of this transaction the undertaking was confined to the time specified in the lease. If this be not the true rule, then the security can do nothing to relieve himself, and must remain for an indefinite period liable for the rent.

If by the silence of the security the landlord is not put upon his guard as to the solvency of the tenant, or the intention of the security, both at law and in equity, the security might be held responsible, for then an implied agreement may be said to exist by which he remains bound.

Where, however, a notice is given which is direct in terms and ample in time, why should not the security be in effect subrogated to the rights of the landlord? For as he, the landlord, may remove the tenant, so may the security do the same thing through and by means of a notice, which at once warns the landlord and points out to him the remedy which he ought to apply to the case.

In Pennsylvania we have a class of cases in which it has been decided that where a debt may be collected from the principal debtor notice of that fact, if direct and specific, will discharge the security; this is, of course, not that case, but in principle we may extend the application of the law to this case. When we, in the first instance, look at the terms of the lease, and from them gather the intent and meaning of the parties, and then seizing the principle now well settled, that a security may stand as to every remedy of the creditor in his place, apply it by giving

legal validity and force to a sufficient notice from the security to the landlord, we do injustice to no one.

The exception is dismissed and the report confirmed.

Chapman Biddle, Esq., for exceptants.

David Webster, Esq., contra.

[Leg. Int., Vol. 29, p. 212.]

ESTATE OF WILLIAM BINDER.

A devise of real estate to trustees to pay net income to a son of testator for life, and after his death to such persons as would be entitled if the son had died intestate seized of the estate: *Held*, that although no estate vested in the son, his wife surviving him was entitled under the will to the income of one-third of this estate.

Opinion delivered *June 29, 1872*, by

ALLISON, P. J.—The question which is raised by the petition and demurrer, in this case, grows out of the following clause of the will of William Binder, deceased.

"The real estate is devised:—In trust to pay the net rents and income thereof to my son, Daniel Binder, or appropriate the same to his benefit and the benefit of his family, for and during all the term of his natural life, without being subject or liable for his debts, contracts, or engagements; and from and immediately after his decease, then in trust, for the only proper use and behoof of such person or persons, and for estate and estates, as such person or persons would be entitled to, if the said Daniel had died intestate, seized of the same in fee simple."

The commissioners appointed to make partition of the estate of William Binder, report, that if Elizabeth Binder, widow of Daniel Binder, has an interest in the premises described, under the intestate laws of this Commonwealth, then they value her interest at \$1561.11 and one-ninth cents, to be charged on the premises according to law.

The widow of Daniel Binder prays the court to direct, that she is fully entitled to her thirds as widow, under the intestate laws of this Commonwealth, and that her interest be charged on the premises accordingly, and that one-third of the moneys derived from the sale of a ground-rent be invested, so as to secure to her for life the interest upon the same.

The petition is demurred to, because Daniel Binder had but a life-estate in the income. Second, for the reason that it was the intention of the testator, William Binder, that his property should go to his legal representatives, in lineal descent; and third, that neither the legal nor equitable title to said property was ever vested in Daniel, the husband of the petitioner, and that he had not, for this reason, such an estate in his lifetime, of which his widow could be endowed.

If the questions raised by the demurrer depended on the fact, as to whether the petitioner could take dower interest in said property, in right of her husband having possessed the same in his life, the demurrer would have to be sustained. It was settled as early as *Shoemaker vs. Walker*, 2 Sergeant & Rawle, 554, that a woman was not entitled to dower of an estate, the remainder of which in fee was vested in her husband, dependent on an estate for life of a third person, which remainder the husband had aliened during coverture. This case rested

on the principle that by the common law there can be no dower unless the husband is seized, in fact or in law, of the freehold, as well as the estate of inheritance, during coverture. In the case before us, Daniel Binder never was seized of the legal or equitable estate in the property in question; his trustees held the estate with authority to pay income to him for life, or themselves to apply the same to his and to his family's support. Whatever the widow of Daniel takes of the estate of her father-in-law, is not therefore grounded on a claim that her husband was ever seized of the same. But what then? Is she to be excluded from the enjoyment of one-third of the proceeds of said property, and must the prayer of her petition be denied her? We think not, because she is to be treated upon the question of distribution, just as if her husband had died seized of said property. William Binder had an undoubted right to direct who should take his property after the death of his son, and he has said, that such persons shall have it as would be entitled to the same if his son had died intestate, seized of the same in fee simple. If the son had died seized of this property in fee simple, his widow surviving him would take a dower interest in it, and she is now entitled to exactly the same interest as if he had owned the same in his lifetime, and had died possessed of the same. His children derive their right to their shares from the will of their grandfather, and take just what they would under the intestate laws be entitled to if their father had owned it in fee simple at the time of his death. The right of the mother is equally clear with that of the children, there being no purpose to the contrary of this to be gathered from the will of William Binder.

This conclusion requires us to direct that the one-third interest of the estate of William Binder be secured to the widow of Daniel Binder, in the manner prayed for, and we do this by overruling the demurrer and entering judgment for the petitioner.

George W. Thorn, Esq., for widow.

A. V. Parsons, Esq., contra.

[Leg. Int., Vol. 29, p. 220.]

ESTATE OF N. K. SHOEMAKER.

The Orphans' Court may, if they see fit, disregard the verdict of a jury upon an issue passed and awarded upon exceptions to an auditor's report.

Exceptions to auditor's report. Opinion delivered *July 3, 1872*, by LUDLOW, J.—This case has a special history. When it came before the court, several years ago, twenty-five exceptions were filed to the report of the auditor; an effort was then made to send the case to a jury in the Common Pleas upon an issue framed for that purpose; after argument an issue was awarded, this issue was tried, and a verdict rendered in favor of Craig's estate, and therefore against the findings of the auditor.

The exceptions to the auditor's report are again before this court, and we are also informed of the result of the jury trial upon the issue framed. The evidence produced and the proceedings had in the Common Pleas are all before us now, and we must proceed to dispose of the exceptions to the auditor's report.

It requires no argument to prove that we may decline to be governed by the verdict of the jury.

An issue awarded out of the Orphans' Court is precisely like an issue out of a court of chancery, for the Orphans' Court, exercising jurisdiction analogous to that of a court of equity, is to be governed by the same principles. The whole object of the issue is to satisfy the conscience of the court, and if, after a careful inspection of the records and proof submitted at the trial, the conscience of the court is not satisfied, it is a plain duty to disregard the verdict.

In *Will's Appeal*, 10 H. 325, the Supreme Court restate these principles, and as they cannot be doubted, we shall act upon them.

The contest in this case arose out of an alleged effort made by one James Craig, administrator of Shoemaker, to protect the property of Shoemaker from the lawful demands of his (Shoemaker's) creditors.

The auditor found that as Craig had bought the personal property of Shoemaker at the "Grant House" for a fraudulent purpose, he (or as he is now dead his estate) must be surcharged with the proceeds of the sale of this personal property.

The jury in the feigned issue found otherwise, but we are satisfied that that verdict ought not to stand, and that the finding of the auditor was right.

It is true that I, as the Judge of the Common Pleas who tried the issue, refused a motion for a new trial; but as this action of the court was only technical, and as I did not see any objection to the legality of the trial, the result upon the motion made could not have been different. Now, however—and the Orphans' Court, when called upon critically to examine the evidence produced at the trial—I cannot say that it or its result ought to have any weight in the final settlement of this controversy. The circumstances attending the sheriff's sale, the manner in which it was conducted, the price which the property brought, the appearance and reappearance at the house of Shoemaker, the manner in which the business was conducted by him, and the statement made by Craig himself, as proved by the testimony of one witness, to wit, that "he had so much against the property, and the balance belonged to Shoemaker, that he owed him \$2000, to reach his (the witness's) debt; the balance was to be paid in instalments, which were to go to Kline Shoemaker," all appear to bear but one construction, and that one not favorable to the exceptants. In reviewing the evidence at the trial, we cannot but believe that the introduction of testimony in the nature of bills and receipts collected after Shoemaker's death, by Craig, had much to do with this verdict; and while I do not yet see that it was not legal testimony, yet both my brother Allison and myself think it had an unjust and most injurious weight with the jury. After a very careful and protracted examination of all the evidence, we are forced to disregard this verdict and to sustain the auditor. All the exceptions down to the eighteenth, and including the twenty-fifth, relate to the subject-matter above mentioned. And as we think the auditor did right upon the authorities cited by him, and for the reasons assigned, in either postponing or disallowing the claims specified in the exceptions from eighteen to twenty-four inclusive, we dismiss each and all of them.

We see nothing in the single exception filed by the counsel for the creditors, and we therefore dismiss it.

Report confirmed and all the exceptions dismissed.

S. N. Rich, Esq., for creditors of Shoemaker's estate.

James Otterson, Esq., for administrators of Craig's estate.

[*Leg. Int.*, Vol. 29, p. 317.]

ESTATE OF JOHN CUNNINGHAM, DECEASED.

1. In the absence of personal estate, real estate is the only resource of creditors of a decedent.
2. In all cases an account should be filed by the administrator.

Opinion delivered *September 28, 1872*, by

PAXSON, J.—We are unable to sustain any of the exceptions filed to the auditor's report. It is undoubtedly true that the personal estate is the fund primarily liable for the payment of debts. But it is conceded that there is no personal estate. The realty is therefore the only source to which the creditors can look for satisfaction. Practically, in this estate, it could not make any difference, as the same persons would take the personalty, if there were any, as are entitled to the proceeds of the realty, after payment of debts. I desire to say just here, that we do not commend the manner in which this estate is being settled. No account has been filed by the administratrix. She sold the real estate of the decedent under an order of court for the payment of debts, and the proceeds of said sale were brought into court. An auditor was thereupon appointed to distribute the same. We are embarrassed by the fact that there is no satisfactory record evidence of the absence of personal estate. We are so well satisfied of this, however, that in view of the trifling amount of the estate, we will not send the report back to the auditor for a more explicit statement as to this point. But we regard the settlement of a dead man's estate, without filing an account as a careless mode of doing business in the Orphans' Court, and we will not allow this case to be drawn into a precedent.

The claims of the creditors seem to have been properly allowed by the auditor. Nor do we see any objections to the claims for counsel fees. The deceased seems to have been fond of litigation. It was his right to indulge in such a costly luxury, and if it has left a charge upon his estate the heirs must take it *cum onere*.

Nor do we think the auditor erred in refusing the issue demanded by William Renaghan. The affidavit submitted in support of this demand does not bring the case within the rule laid down by this court in *Beehler's Estate*, 3 Philadelphia Reports, 254.

The fee charged by the auditor does not exceed the limit prescribed by the act of assembly, and an examination of this report, and of the labor necessarily involved therein, does not lead us to the conclusion that it is excessive.

The exceptions are dismissed, and the report of the auditor confirmed.

Henry McIntyre, Esq., for exceptants.

C. B. F. O'Neill, W. L. Bladen, and J. G. Brinckle, Esqs., contra.

[Leg. Int., Vol. 29, p. 332.]

ESTATE OF SUSAN E. MONRO, DECEASED.

Real estate of a decedent is a fund for the payment of legacies.

Petition and answer. Opinion delivered *October 12, 1872*, by
PEIRCE, J.—The question presented by this case is, whether the legacies bequeathed by the testatrix are charged upon and payable out of the land left by her.

The testatrix begins her will as follows, viz.:

March, 1870. Wishes in regard to the disposal of my property.

I made a record some years ago in regard to the same matter, but circumstances have altered since then.

I look upward for wisdom to direct me, feeling my own liability to err, and wishing to do the will of God, whether I live or die, through the strength that is in Christ and accorded to all who seek for it in humility.

I estimate the value of my house in School street at \$4800.

I have nearly \$5000 on interest in Mr. Dungan's hands.

She then bequeathed various money legacies amounting to \$8000, and a number of specific bequests of pieces of furniture and other personal property.

She made no special devise of her real estate; and the personal property is insufficient to pay the legacies; the inventory and appraisement thereof amounting to \$228.75.

It is stated by Rogers, J., in *McLanahan vs. McLanahan*, 1 Pennsylvania Reports, page 112, as the unquestioned law of Pennsylvania, that when the real estate is blended by the testator with the personal, the land is charged with the payment of legacies. And the reason assigned is, that the whole will may take effect, and all the legacies be paid, which is justly supposed to be the intention of the testator, when both funds are put into one.

The implication in this case is helped by the expressed wishes of the testatrix to dispose of her property; by which in the absence of any intention to dispose of but a part of it, it may be fairly inferred that she intended to dispose of the whole of it. And this further appears to be her manifest intention, from the fact that she makes no devise of her real estate as such.

She also gives pecuniary legacies to the amount of \$8000, when her whole personal estate not specifically bequeathed is but \$228.75, and even if the amount of \$5000 in Mr. Dungan's hands had been realized, it would have fallen short by \$3000 of paying the legacies.

We think it is manifest from the face of this will that the testatrix intended that both her real and personal estate should be a fund for the payment of the legacies.

Decree in favor of the petitioners.

L. C. Cleeman, Esq., for petitioners.

[Leg. Int., Vol. 29, p. 356.]

ESTATE OF JOHN MYERS.

1. An executor having a naked authority to sell real estate is not chargeable with a failure to collect rents. This is not part of his duty.
2. Auditors must comply with the act of assembly and rules of court in fixing their fees.

Exceptions to auditor's report. Opinion delivered *October 30, 1872*, by

PEIRCE, J.—The principal question raised by these exceptions is, the liability of the accountant to be charged with the rents of the real estate of the decedent.

The decedent appointed the accountant his executor, with full power to sell all his estate, either at public or private sale, to the purchaser or purchasers thereof, in fee simple, without an order of court.

The act of February 24, 1824, s. 13, directs that the executors of the last will of any decedent, to whom is given thereby a naked authority only to sell any real estate, shall take and hold the same interests therein, and have the same power and authorities over such estate for all purposes of sale and conveyance, and also of remedy by entry, by action, or otherwise, as if the same had been thereby devised to them to be sold, saving always to every testator his right to direct otherwise.

The act of 1792, from which, in part, the act of 1834 is taken, put no restriction upon the power of the executor, but conferred upon him the same interest in the land, and the same powers and authorities, as if the land were devised to him to be sold, saving always to every testator the right to direct otherwise: 3 Smith's Laws, 277.

Under the statute of 1792, it has been held that an executor with a power of sale of the land of his testator had the same interest and authority over the land as if he were a devisee for the purposes of sale. *Allison vs. Wilson's Executors*, 13 S. & R. 332; *Allison vs. Kurtz*, 2 Watts, 188.

But it is to be noticed that the act of 1834 qualifies the power by restricting it to all purposes of sale and conveyance, by entry, action, or otherwise. The reasonable meaning of which is, that whatever powers were necessary for the executor to have, to enable him to execute the power of sale, were conferred upon him by the act; leaving the estate in all other respects where the law cast it, upon the heir.

And so in *Chew vs. Nicklin*, 9 Wright, p. 87, it was held by Woodward, Justice, that the words expressive of the legislative thought of 1834, as well as that of 1792, show that it was not the design or purpose of either statute to break the descent or work a conversion of real estate, over which a naked power of sale had been given, but only to enable them to recover, protect, and sell the estate as fully and absolutely as if, instead of a naked power, an interest had been devised to them.

This question has been well and ably considered by Hare, J., in *Blight vs. Wright*, 1 Philadelphia Reports, 549, who held that a power by will to executors to sell land, did not invest them with the entire control and management of the testator's real estate, so as to authorize them to receive and recover the rents and profits thereof.

As, therefore, there was no duty on the part of the executor to collect these rents, he is not chargeable in the Orphans' Court with a failure

to collect them; if he is liable to the parties in interest, upon his alleged undertaking to collect them, it is in another forum, as was the case in *Landis vs. Scott*, 8 Casey, 495, where an executor was charged in equity as a trustee for the devisees, with the rents of real estate of his testator, of which he had assumed the charge without authority.

Exception has also been made to the auditor's fee. In reporting on this exception the auditor says, that both the auditor and counsel considered the fee low, in view of the work done. That the auditor is aware that his fee is larger than permitted by the act, but that he thinks this is one of the cases where the court has discretion, and where the compensation allowed by the act is entirely insufficient.

But the auditor has not complied with the rule of court, or the act of assembly, in fixing his fee. He says that the counsel considered the fee low, but he does not say what counsel; nor that the fee was designated by the counsel representing the parties liable to pay the costs of the proceeding as prescribed by the rule of court.

If the auditor relied on the discretion vested in the court by act of assembly to allow additional compensation, his appeal should have been made to the court. The court is ready at all times to see that full justice is done to both the auditor and the suitor. Complaints frequently reach the ear of the court of charges made by auditors, which should have been made the subject of exception. We wish it distinctly understood, that we desire and require the auditors appointed by this court to comply with the act of assembly and the rule of court respecting the fee or compensation to be allowed them.

The remaining exception is to a surcharge of the accountant of a sum of \$31.25, without crediting him with an error of like amount in the appraisement. If he debited himself with the whole amount of the appraised value of the goods of the decedent, and it was afterwards discovered that appraised goods of the value of \$31.25 did not belong to the estate, but to the widow, he should have been credited with this amount as an error in his account.

As the first account in which this alleged error is said to have occurred is not annexed to the auditor's report, the correctness of this exception cannot be determined.

The exceptions of accountant to the surcharge of rent, and to the auditor's fee, are sustained, and the report is recommitted to the auditor to re-state the account in conformity with this opinion, and to correct the error, if any, referred to in the first exception.

The other exceptions are dismissed.

W. C. Adams and Alfred Driver, Esqs., for creditor and heirs.

William Hopple, Jr., Esq., for widow.

W. H. Martin, Esq., for executor.

[Leg. Int., Vol. 29, p. 396.]

ESTATE OF ELIZABETH JACOBY, DECEASED.

Purchasers at sheriff's sale, whose interest is swept away by another sale under a paramount incumbrance, have a right to come in on the fund.

Sur exceptions to auditor's report.

Elizabeth Jacoby died January 26, 1868. By her will she devised all her real estate to her nine children in fee.

On March 6, 1871, her real estate was sold by the sheriff under a judgment upon a mortgage given by the deceased, and the balance of the proceeds of the sale, after the payment of the mortgage and costs, was paid over by the sheriff to the administrator of the estate, for distribution, in accordance with the thirty-third section of act February 24, 1834, Purdon, 288, which provides, "That such money shall be distributed as the real estate of which it is the proceeds would have been."

The account of the administrator was filed, and referred to an auditor. The auditor distributed seven shares of the nine which were undisputed. Two of the shares—that of Charles Jacoby, amounting to \$1272.15, and that of Frederick F. Jacoby, amounting to \$791.90—were claimed by opposing judgment creditors.

On January 20, 1869, Frederick F. Jacoby confessed a judgment to Casper Hest for \$1791.50, under which his interest in his mother's real estate was sold at sheriff's sale on the first Monday of August, 1870, bought by Hest, and a deed therefor executed on September 19, 1870. This sale was made on *fi. fa.* with waiver of condemnation.

On the same day that Hest received his judgment, Charles Jacoby sold his one-ninth to Frederick F. Jacoby, but made a deed for the same to one Reuben F. Brown, who held the title, as alleged, to conceal the real ownership from Frederick's creditors.

On September 2, 1867, John Maxwell held a judgment against Frederick F. Jacoby. This judgment was revived, and on October 8, 1870, judgment obtained for \$739.48. Maxwell's judgment of 1867 was not a lien on Frederick's interest in his mother's estate, but became so, on October 8, 1870, by the revival.

Maxwell levied on Frederick's interest, being the two-ninths in question, sold the same, and, on January 7, 1871, received a sheriff's deed therefor.

Before the auditor, Maxwell gave evidence showing that Hest's title was void, having been obtained under a judgment given by Jacoby to defraud, hinder, and delay his creditors, and although valid *between the parties to it*, yet as against creditors it was void, and the sale under it did not pass a valid title to Hest.

The auditor decided that the Hest judgment was founded upon fraud and void as to Maxwell, to whom he awarded the entire fund under his judgment and purchase thereunder.

Hest filed exceptions to the auditor's report.

Brown did not file any exceptions.

Opinion delivered December 7, 1872, by

PAXSON, J.—The fund for distribution is the proceeds of the sale of real estate. Elizabeth Jacoby, the testatrix, died in January, 1868, having first made and published her last will and testament, by which she devised all her real and personal estate to her minor children, share and share alike. Under this will two of her children, Frederick F. Jacoby and Charles Jacoby, each took one-ninth part of certain real estate at the corner of Germantown road and Manheim street. On January 20, 1869, Frederick F. Jacoby confessed a judgment to Casper Hest for \$1791.50, under which judgment the interest of Frederick, in the real estate in question, was sold by the sheriff under a *fi. fa.*, con-

demnation having been formally waived by said Frederick; the said Heft became the purchaser at said sale, and a deed was executed to him by the sheriff. On the day the above judgment was given and entered in the office, Charles Jacoby granted by deed his one-ninth of the said real estate to one Reuben F. Brown. The latter was a clerk of Mr. Heft, and the auditor finds as a fact, that Brown took title for Frederick F. Jacoby; that the latter was the real purchaser, no consideration having been received from Brown. There is no dispute as to this part of the case. On September 2, 1867, John Maxwell held a judgment recovered adversely against Frederick F. Jacoby, in the District Court, for the sum of \$1030.65. This judgment it will be seen was not a lien on the one-ninth interest of Frederick in the real estate of Elizabeth Jacoby; the said judgment having been recovered prior to the death of the latter. For the purpose of making it a lien, a scire facias to revive was issued, and judgment obtained thereon, on October 8, 1870. This, it will be seen, was after the sale of the property on the Heft judgment. Notwithstanding this fact, Maxwell levied upon and sold by the sheriff, under his judgment, all the right, title, and interest of Frederick F. Jacoby in the said real estate, and became the purchaser thereof at said sale. He was thus in a condition to test, in an action of ejectment, the validity of the title acquired by Mr. Heft. In this position of the case the title of both the parties was swept away by a sheriff's sale of the premises under a paramount mortgage; and the amount of the purchase money, after the payment of said mortgage, was paid to the administrator.

Seven-ninths of the fund were distributed to the heirs by a former report. The remaining two-ninths being the shares of Frederick and Charles Jacoby, remain to be disposed of by this supplemental report.

The auditor awarded the whole fund to the Maxwell judgment, upon the ground that the Heft judgment was fraudulent and collusive, was given for the purpose of hindering and delaying creditors, and therefore void. This ruling is made the ground of exception in various forms, by the learned counsel for Mr. Heft.

The auditor comes to this conclusion from a number of facts in the case, no one of which standing alone could be regarded as improper, yet which, taken in connection with the other, and the conduct of the parties, leads him to the conclusion that the Heft judgment was collusive. Among these facts may be mentioned, 1st. That Frederick Jacoby confessed the judgment upon which Mr. Heft's claim rests. 2d. That he waived inquisition in order to allow the property to be sold under a *fi. fa.* in the month of August. 3d. That the Maxwell judgment was hanging over him at the time he confessed judgment to Heft. 4th. The placing of the interest which Frederick had purchased of Charles, in the name of Mr. Brown, on the day he confessed the judgment. 5th. That Frederick continued to receive the rent of the property for the two-ninths, after the alleged sale to Heft, without any evidence that said rent had ever been paid over to the latter. 6th. That the conduct of Frederick before the auditor was such as to lead to the conclusion that he was endeavoring to defeat the Maxwell judgment, going so far at last as to employ counsel to represent him before the auditor, etc. We think the auditor was right in saying that no one of these

acts was of itself sufficient to establish collusion. A confession of judgment and waiver of inquisition are not *per se* evidences of fraud, but they are circumstances which may be taken into consideration in the determination of such a question. So, too, of the receipt of the rents. If shown to have been bona fide, and to have been subsequently paid over to Mr. Hest, there would have been little in it. But with the rents still in his pocket, and that circumstance unexplained, the case is different. Again, there was no attempt made to sustain the Hest judgment by proof of consideration. It had been attacked, and a chain of suspicious circumstances proved which required explanation. Frederick Jacoby, Hest, and Brown were all competent witnesses. The act of assembly had removed the padlock from their lips, and yet they say nothing. This is significant. There is a time to speak as well as to keep silence.

In view of all these circumstances, we are not prepared to say the auditor erred in coming to the conclusion that the Hest judgment was collusive.

The next question is, whether Mr. Maxwell has such a standing here as entitles him to raise this question. While it was conceded that he might have done so in an action of ejectment; yet in view of the fact that the property had been sold under the paramount mortgage, it was urged that there was no precedent for coming in upon the fund, this not being a question between two judgment creditors, as such, but between two purchasers at a judicial sale. It is quite possible there is no precedent. The industry of counsel has failed to furnish any, and the court has no present recollection of such a case. But if necessary we must make a precedent. Were we to pause where the decided cases stop, the law would be chained to its dead past, without progress and without a future. The decision of to-day, if sound, becomes the rule for to-morrow. Where precedent fails, we must look to reason and analogy, the living fountains of the law, out of which all correct legal principles flow.

We are met at the threshold of this inquiry by the allegation, that the judgment of Mr. Hest cannot be impeached collaterally. The phrase, impeaching a judgment, is sometimes used without a very clear appreciation of its meaning. To impeach a judgment is practically to destroy it. This can only be done by the defendant. Fraudulent judgments may be divided into two classes, viz.: 1st. Judgments which are a fraud upon the defendant; and 2d. Judgments which are a fraud upon his creditors. In the first class, the defendant is no party to the fraud, and he is the only person who can assail it. If he does so successfully he destroys it. In the second class, both the plaintiff and defendant are parties to the fraud. The defendant has no power to impeach such a judgment. As to him, it is always good. There is no more binding consideration known to the law than the mutual fraud of the parties. But the creditors, those whose rights a fraudulent judgment would strike down, have a right to show the fraud. Having done so, the law steps in and loosens from the grasp of such judgment the property it was intended to cover up, leaving the defendant to grapple with his fraud as best he may. The judgment is not disturbed. It is left in full force and unsatisfied as to the defendant.

A judgment can be attacked collaterally by a creditor whose rights

are affected by it, as when it is intended to defraud, hinder, and delay a creditor in the recovery of his claim. *Dougherty's Estate*, 9 W. & S. 789; *Thompson's Appeal*, 7 P. F. S. 175; *Clark vs. Douglass*, 12 P. F. S. 408; *Campbell vs. Sloan*, Id. 481.

It must be conceded that the rights of these parties were fixed prior to the sale under the mortgage. Said sale was not a matter within the control of either of them. They both claimed the property under a deed from the sheriff. Can it be that a sale under the mortgage settled their rights? And if so, how settled? To whose benefit is said sale to accrue? The property itself having been swept away, the claimants can only look to the fund. Has only one of them a right to do so, and if so, which one?

It is to be observed that Mr. Heft is not in the position of a bona fide purchaser without notice. He purchased at the sale under his own judgment. If the latter is fraudulent as to creditors, he is affected by the fraud, and is in no better position than as though he claimed as a judgment creditor merely. When once the fraud is established, then it is clear that as to creditors no title passed under the Heft judgment. The fund remaining after the payment of the mortgage, as has been stated, was paid to the administrator. He holds it for whoever may be owner of the two-ninths interest referred to. It must be conceded that such owner can follow the fund. Otherwise it must be distributed to the other heirs or legatees who have no possible claim upon it.

It can hardly be pretended that if an heir to an estate should make an assignment of his interest therein for the fraudulent purpose of hindering and delaying his creditors, the latter could not contest the validity of such assignment before the auditor, so far as it affected their interest. The fraud consists in the effort to postpone the creditors. The form, or the means used to effect it, is not material. The law will strike down the fraud without regard to the covering which may have been used to envelop it. It is a familiar rule that the owner of property may follow it so long as it remains in specie; or the proceeds thereof, so long as they can be traced or ear-marked; subject, of course, to certain exceptions, where the rights of bona fide purchasers without notice intervene. The owner of this property, or he who was the owner, at the time of the sale under the mortgage, has an undoubted right to follow and claim the proceeds in the hands of the administrator. Is there anything in the form of this proceeding which closes the door upon the inquiry as to who the owner really is? If so, then the one party or the other has lost his right, or the remedy to assert it, by an event over which he had no control. Were we to hold that Mr. Maxwell has no standing as a claimant upon this fund we would leave him without remedy. To justify us in doing this there ought to be a clear and inflexible rule of law requiring it. The burden of proof is upon those who assert that he has no standing. We think they have failed to sustain it.

So far as the share of Charles Jacoby—which, as we have seen, was sold to Frederick, and the title thereto taken in the name of Mr. Brown—is concerned, it is sufficient to say, that it passed by the sale under the one or the other of the judgments.

What we have said covers the whole case. A number of exceptions

were filed, but they are substantially answered by the foregoing, which renders it unnecessary to take them up seriatim.

The exceptions are dismissed and the report of the auditor confirmed.
Thomas R. Elcock and *Theodore F. Jenkins*, Esqs., counsel for Hest.
William Ernst, Esq., counsel for Maxwell.

[Leg. Int., Vol. 30, p. 12.]

ESTATE OF JOHN P. TWADDELL, DECEASED.

Testator devised to his wife in trust for herself and children, and after a certain time, "if the executor thinks it may be more productive, the property to be sold and the money divided." The parties by deed agreed to take the land as personalty, they lately have sold it, and a purchaser alleging title in the executor, asked the court to order him to convey: *Held*, that this was not a mere naked power, and the executor directed to convey to the purchaser any title held by him, and allowed \$1000 for his services.

In the matter of the petition of Lydia B. Twaddell and others. Opinion delivered *January 7, 1873*, by

PEIRCE, J.—John P. Twaddell, by his last will and testament, devised his farm in Blockley township, and his property corner of Broad and Locust streets, in the city of Philadelphia, to his wife in trust for the use of herself and his children by her; "and after fifteen years, or one, or two, or three years after, if the executor thinks it may be more productive, the above described farm in Blockley township, and also the property on Locust and Broad streets above mentioned are to be sold to the best advantage, and the money to be appropriated and divided" to his wife and children by her, as he therein directed.

There was no sale made of the property by virtue of the power or discretion above given to the executor, and on the 5th of September, 1861, the parties entitled thereto, by deed poll, elected to accept and take the said real estate as land in lieu of the proceeds of sale thereof, and to dispense with any sale thereof.

The petitioners set forth, that they have sold and conveyed portions of said property, and have made contracts for sale of other portions thereof. That objection has been raised to their power to make a clear title in fee simple to the same, on the ground, that by virtue and reason of the power of sale in testator's will herein before recited, there is an outstanding legal title to the said real estate in Edward Twaddell, executor, and that said executor claims that he is possessed of such title and accountable for said real estate.

They, therefore, pray the court to order and decree the said executor to convey to them the said outstanding legal title.

The executor, in his answer, sets forth his conferences with the petitioners, relative to the sale of the property; his procuring a plan or survey thereof, with the view of bringing the property into the market, his planting of shade trees along Baltimore avenue, to make it more attractive. He further says, "I also put up a placard, 'This property for sale, inquire of E. Twaddell, No. 1828 Market street.' This placard remained up about two years, a number of persons called on me about its purchase, and I believe that I could at that time have sold that property for about \$90,000, and the Broad and Locust street property

for about \$10,000, making the total \$100,000. But as my only object was to promote the interests of the petitioners, and finding that they were not anxious to realize, I did not force the market, nor even entertain propositions for the purchase of the property, as I otherwise would have done."

He further says that the present value of the property is about \$300,000. He claims a commission on the property, and prays that his rights in the premises may be determined by the court.

It seems to us, that at the most, the executor is but the donee of a power, and not the holder of the legal estate. That was devised directly to Lydia B. Twaddell, trustee for herself and her children.

There is a well-settled distinction between a mere power and a trust. It is perfectly clear, that where there is a mere power of disposing, and that power is not executed, the court cannot execute it. It is equally clear, that whenever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, the court will execute the trust. But these are not only a mere trust and a mere power, but there is also known a power, which the party to whom it is given is intrusted and required to execute; and with regard to that species of power, the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed upon him does not discharge it, the court will, to a certain extent, discharge the duty in his room and place. *Brown vs. Higgs*, 8 Vesey, Jr., 569.

The power given to the executor in this case was in the nature of a discretion to determine whether at and within the time limited by the testator, the land should be sold. He proceeded to exercise this power by determining that it was for the interest of the parties that the land should be sold, and he took steps to effect a sale of it. Whilst he was so engaged, the parties by deed poll of 5th September, 1861, elected to take the property as land. It is probable, that by the exercise of the determination of the executor, that the property should be sold, and by force of the will of the testator, the land thereby became converted into personalty. But it is clear, that notwithstanding this, the parties had a right to elect to take it as land. *Burr vs. Sims*, 1 Wharton, 252; *Smith vs. Star*, 3 Wharton, 62; *Shallenberger vs. Ashworth*, 1 Casey, 152. And they having so elected to take, the executor had no further duty to perform in respect of it. There was no title to the estate vested in him, and as the power of sale was defeated by the act of the parties in electing to take the property as land, there is nothing really in him to convey or release to the parties. But, as the Supreme Court has said, that in such cases, there rests a cloud upon the title which embarrasses the right of alienation, it is deemed best to decree a conveyance by the executors to remove this cloud. *Kay vs. Scates*, 1 Wright, 40.

The executor also prays us to determine his rights in the premises. Like every other executor, agent or trustee, called on to assume a responsibility, exercise a discretion or perform a duty, he is entitled to such reasonable compensation as the circumstances of the case require.

The power given to him by the testator was one which not only required of him the exercise of judgment, but also inquiry into and acquaintance with the then present and prospective nature of the land, and the exercise of a wise and honest discrimination to have it sold.

His right to compensation does not depend upon whether or not the land was sold; but upon the faithful exercise of the power given him by the testator. If he had determined in the exercise of this power, that the land should not be sold, he would be equally entitled to compensation. It is not to be presumed that the testator expected him to exercise this power without compensation.

Commissions are given as a compensation for labor and responsibility. Compensation is proportioned to the responsibility incurred, and to the labor and care bestowed. *McElhenny's Appeal*, 10 Wr. 349. In this case, the executor not only exercised the discretion and power conferred on him by the testator, but with the consent of the parties assumed some care and oversight of the property. And although the Orphans' Court is not the proper jurisdiction in which to seek compensation for services rendered at the instance of the parties, yet having been brought into this court at the suit of the petitioners, and the subject of his compensation being before the court, we think we may look at his entire services rendered to the petitioners in respect of the estate in which they are interested, and measure his compensation accordingly.

If we were to fix the compensation as a commission to be paid, we would assume the value of the estate at the time of the exercise of the power vested in him to be \$100,000, the value fixed by himself, and allow him a commission of one per cent. on that sum, which is as much as would probably have been allowed to him if a sale had been made. But whether considered as a commission or not, we think the sum of \$1000 will be a full and fair compensation for the services rendered by him.

Let a decree be entered, directing the respondent to convey to the petitioners, by a deed to be prepared by them, and presented to him for that purpose, all his interest in, and power and right of control of said estate; and that the said petitioners pay to him the sum of \$1000 as a compensation for his services in said matter.

J. Cooke Longstreth and J. B. Townsend, Esqs., for petitioners.
William Henry Rawle, Esq., contra.

[Leg. Int., Vol. 30, p. 12.]

ESTATE OF JOHN McCARTY, DECEASED.

There is nothing in the relationship of sister-in-law to a decedent to raise any presumption against her claim for services as housekeeper. There is no custom here to pay servants weekly or monthly.

Sur exceptions to report of auditor. Opinion delivered *January 3, 1873*, by

FINLETTER, J.—The claimant was the sister-in-law of decedent. She performed all the duties of housekeeper and servant, and in addition did the washing and marketing. In this she had no assistance and needed none, as the family consisted only of the decedent and his grown-up daughter.

Her services continued to the death of her brother-in-law, and covered a period of fourteen months, for which she claimed pay at the rate of \$3 per week. The evidence which has been reported to us does not show an express contract; nor does it warrant the finding of the auditor that

it was the case of an asylum, rendered to the claimant in consideration of her services, rather than a contract to pay therefor.

There is evidence that "he was to pay her," which, although unsatisfactory, throws some light upon the relation in which the parties stood in regard to the services which were rendered. If it be considered merely as the opinion or surmise of the witness, it is still of some weight, as showing that appearances at least indicated that the claimant occupied the position of servant for pay, rather than the position of one living upon the charity of another.

However this may be, that she performed all the duties of housekeeper and servant is undisputed. From this alone the contract could and should be inferred, unless the circumstances of the case be inconsistent with the relation of employer and employé.

The only circumstances upon which the auditor relies in rejecting her claim are, that "she was the sister-in-law of the deceased; that there was no evidence of any demand for wages; and that she kept no accounts."

The relationship which had existed made it more desirable that she should keep house for him; but it is not inconsistent with the fact that she rendered these services for wages. What obligation did it impose upon her to render gratuitously services for which she might elsewhere have been well paid? What obligation was there upon him to give her an "asylum?"

When we consider that one party is dead and the other is not permitted to testify, it may very well be that no evidence of a demand of wages could be produced. Servants, even if capable, seldom keep accounts. It would be hard ruling to hold, that a servant or any one else must *prove* demand for payment, or show accounts before recovery could be had.

The claimant had no need for her wages. She was amply supplied by her husband. Might not a disposition to accommodate her relative, and a desire to keep her earnings together, until her husband's return from the war be sufficient reasons for not demanding them? If they were not, might not respect for the feelings of her relative prevent her from making her demand public?

The auditor finds that there is a legal presumption that servants are paid either weekly or monthly. If this be so in England or elsewhere, it is not so here. It is not the practice to pay either weekly or monthly, or at any stated times; and there is nothing in the contract or services from which it may be legally inferred.

The act in relation to decedent's estate, which makes the wages of servants for *one year* preferred claims, is inconsistent with such a presumption.

It is not the fault of the claimant that the estate has not been settled sooner, and the argument of staleness is therefore fallacious.

Exceptions sustained.

John G. Johnson, Esq., for exceptants.

E. C. Quin, Esq., contra.

[Leg. Int., Vol. 30, p. 36.]

ESTATE OF JOHN H. SYFERT.

Duties and liabilities of trustees discussed as to mixing trust funds, refusal to exhibit books, etc.

Exceptions to report of examiner. Opinion delivered *January 25, 1873*, by

LUDLOW, J.—We have carefully considered the elaborate report of the examiner, the exceptions filed to it, the evidence, and the authorities cited by the parties interested, and we fail to discover any reason why we should sustain the exceptions.

Upon four points especially have we paused and deliberated, because if either of them had been in fact sustained we might have been obliged to discharge the trustee.

These points may be briefly stated as follows, viz. :

The disagreement of the trustees; the mixing of the trust funds and accounts with the private funds and accounts of the trustee; the giving of checks without funds in bank to pay them; and the refusal to exhibit the books and accounts of the estate.

Upon the first point we are quite certain that unfortunate difficulties exist, but it does not appear to us that this trustee is any more to blame than his co-trustee; the same argument which would oblige us to remove the one would compel us also to discharge the other.

The true rule of law doubtless is, as is proved by an examination of the authorities cited by the examiner, that a disagreement between trustees which does not endanger the safety of the estate will not require us to inflict summary punishment. In this instance, the testator had himself selected the respondent, he knew his peculiarities, and it is very possible that because of these he made the selection; no satisfactory proof has been submitted to establish the fact that the trustee is a negligent or dishonest man; and as far as we can judge, on the whole, the trust estate has been properly managed; a division of labor between the trustees seems to have been settled upon, and it will not do to lend a too ready ear to these complaints, when the chief trouble seems to arise from peculiarities of temper for which both parties are to blame.

If this trustee had, to any considerable amount, and without reasonable cause, mixed up his private funds and accounts with those of the trust estate, he might be removed; but the fact is, that while small sums have occasionally been mixed with his own, the reason assigned surely excuses him, for these sums were small, and for convenience he deposited them with his own money until a large enough amount had accumulated to make a deposit. While we say this, we are not to be understood as sanctioning a departure from the well-established rule. As a matter of convenience this course was pursued in this case; it would hardly justify a discharge of the trustee now; it might, however, turn the scale against him had other facts been established throwing doubt upon his integrity or capacity, and it is always attended with peril to the trustee. The giving of a check without funds provided for payment of it is another grave cause of complaint, and if the charge had been established would cause the dismissal of the trustee.

The evidence does not sufficiently support the charge, for the burden was upon the petitioner to establish it.

Checks were given and not at once paid; at the time, however, for some cause, no complaints were made, and a number of accounts have been settled and confirmed; the petitioner failed to specify the dates or amounts of these checks. If any difficulty arose before the settlement of the accounts it ought to have appeared in proof at the time, or before the accounts were settled. If it occurred since that time proof of a specific nature should have been made of time and amount, so that the respondent could defend himself.

On the whole testimony we refuse to sustain this point for want of satisfactory evidence.

The fourth material point in this case involves the non-production of books and accounts. The course pursued by this trustee does not satisfy us, but is not a sufficient cause for a discharge. The trustee evidently labored under the idea that he was not bound to produce his books and accounts, but only to file an account. There was error in this view, for the law is, not that a trustee is bound to submit to a vexatious and unwarrantable call for books and papers, but that at all reasonable times, in proper places, the books and accounts should, on call, be submitted to those who have a right to the inspection of them. The trustee here, always, it seems to us, was ready to file an account; he never, so far as we can determine, refused to do so, and this fact saves his case now, but hereafter, and subject to the principles above stated, he must give to his co-trustee and the parties interested ample opportunity to look into the condition of the estate.

We do not care to notice in detail the other points in this case, because, taken together, and in view of all the evidence, we do not think we would be justified in sustaining the exceptions, and granting the prayer of the petition.

One word before we conclude an opinion already sufficiently extended.

The difficulty in this case, we conceive, does not arise from any want of honesty or capacity, but from peculiarities of character upon one side and a rather suspicious and hasty temper upon the other.

Would it not be well to attempt to modify the one and control the other?

The interests of the estate demand a careful consideration of this question, for the time may arrive when, by the substitution of other trustees, we may be obliged to introduce into the management of the estate those whose characters and tempers will not be the subject of judicial criticism.

Exceptions dismissed and prayer of petition refused.

Theo. Cuyler, Esq., for petitioners.

J. Austin Spencer, Esq., for respondent.

[Leg. Int., Vol. 30, p. 45.]

ESTATE OF JAMES H. HUTCHINSON.

Auditor may retain vouchers of an account until filing of his report, and may attach them to his report in filing same.

Accountant has the right to come into court and ask that they be detached.

Case stated for the opinion of the court. Opinion delivered *February 4, 1873*, by

PEIRCE, J.—In proceeding to vouch the account of the surviving executor, certain vouchers were produced to which exceptions were made by counsel for parties in interest, and the auditor was requested to retain said vouchers until the filing of his report. Auditor decided that where a reasonable objection was made to any voucher, he could not be compelled to pass upon the authenticity of such vouchers immediately on presentation to him, and that he would retain them to satisfy himself as to their allowance, and to enable the parties in interest to examine and impeach them if so desired. That when deemed necessary for the promotion of justice, he has the right to retain all vouchers submitted to him until the filing of his report.

Decision of auditor confirmed.

I. S. Atkinson and J. T. Pratt, Esqs., for parties in interest.

G. L. Dougherty, Esq., for accountant.

[Leg. Int., Vol. 30, p. 84.]

ESTATE OF LAFAYETTE CARNELL, DECEASED.

1. In a devise to a wife during life or widowhood, the widow is entitled to the custody of the personal estate on her giving security as required by the act of assembly.
2. The real estate vests in her also during life or widowhood, subject to the trusts for the maintenance and support of her children.
3. It is not for the Orphans' Court to apportion the commissions between executors.
4. A devise to a church by will dated February 10, and the testator dying March 9, is void.

Sur exceptions to auditor's report. Opinion delivered *March 8, 1873*, by

PEIRCE, J.—This case has been so well stated and decided by the auditor in his report, that it seems scarcely necessary to say anything further about it. The testator, after directing the payment of his debts, and giving his furniture to his widow, devised and bequeathed the remainder of his estate for life or widowhood to his widow. She supporting and maintaining, and educating his children until they should arrive at the age of twenty-one years, with remainder to his children, share and share alike. He also gave a power to his executors on the death or marriage of his widow, during the minority of all or either of his children, to apply the income to the maintenance of the children until the youngest of them shall have attained the age of twenty-one years, when the property was to be divided between them.

Under this devise and bequest the auditor has rightly decided that the widow is entitled to the custody of the personal estate during life or widowhood, on her giving security, as required by act of assembly.

Relative to the one thousand dollars, which was the proceeds of sale of a part of the real estate of the testator derived from his father, made by the heirs of the father after the testator's death, it formed no part of the personal estate of the decedent, and should not have been embraced in the executor's account, but as it was paid by the widow voluntarily to the executors, under a supposed duty on her part to do so, and no commissions were charged on it, and it is now to be repaid to her, she will not be injured by the mistake. If she has already given security for this sum it will not be necessary for her to give further security for it; otherwise, she must enter security as required by act of assembly.

In like manner the real estate of the decedent vests in her during life or widowhood, subject to the trust for the maintenance and support of the children during minority; and she, and not the executors, is charged with the duty, and has the right, to collect the rents thereof, to pay taxes, keep in repair, etc.

Relative to the exception to the division of the commissions between the executors, the auditor was right in disregarding this exception, as it was made by parties who were not affected by the division, viz., the widow and children of the decedent. Subsequently, it was argued as if James Wilson, one of the executors, had made the exception. But the exceptions as filed, do not show any exception by him. Upon an exception by him, this court would have said as it did in *Davis' Estate*, 1 Philada. Rep. 360, that "it is not for us to apportion the commissions between executors." And as the Supreme Court said in *Wickersham's Appeal*, 14 P. F. Smith, 67, that "the Orphans' Court has no jurisdiction over such a question." And to us it seems to make no difference whether the question arises, pending the settlement of the accounts in this court, or afterwards. In either case, we think we have no jurisdiction. If, however, this be done by the auditor, and no exception be filed to it, it is presumably with the assent of the executors, and we cannot of our own motion, correct it as if an exception had been filed to it. If, however, the exception was made on behalf of the executor, it would be our duty to award the commissions as a gross sum to both of the executors, leaving them to determine their respective rights amicably between themselves, or in the proper tribunal for that purpose.

There remains but the question of the devise to the Cohocksink Methodist Episcopal Church. The testator made his will on the 10th of February, 1871, and died on the 9th of March, 1871. The devise is void by reason of its not having been made one calendar month before the death of the testator, as is provided by the act of assembly of 26th April, 1855.

The exceptions are dismissed, and the report of the auditor is confirmed.

W. C. Adams, Esq., for widow, children and James Wilson.

William S. Price, Esq., for acting executor and accountant.

[Leg. Int., Vol. 30, p. 92.]

IN RE BRENNFLOCK'S ESTATE.

1. The law defines clearly the instances in which an administrator can make application for sale of real estate.
2. A widow electing to take her \$300 exemption out of real estate, should proceed according to the act of November 27, 1865.

Exceptions to confirmation of sale. Opinion delivered *March 15, 1873*, by

PAXSON, J.—*Detwiler's Appeal*, 8 Wr. 243, is conclusive that where a widow elects to take her \$300 exemption out of the real estate, where the appraisers have found that said real estate cannot be divided without injury, and their report has been confirmed by the court, the said real estate is bound for the payment of the said sum, in the hands of the heirs, or of the alienees of the acceptors of the land in partition. Further, that the Orphans' Court, upon the application of any party in interest, may enforce such payment by a sale of the land.

This proceeding is radically defective, because the order of sale was obtained upon the application of the administrator. He is not a party in interest. The law defines clearly the instances in which an administrator may make sale of the real estate of a decedent. This case is not one of them. It is a matter entirely between the widow and the heirs. Any stranger had as much right to petition as the administrator.

But the proceedings are defective for another reason. Since *Detwiler's Appeal* the act of 27th November, 1865, has been passed, pointing out the manner in which the widow's right to exemption when she elects to take the same out of the proceeds of realty shall be exercised and enforced. It is not pretended that this act has been complied with. We think the widow is bound to pursue its directions.

We are of opinion that the order of sale was improvidently granted. For this reason we sustain the exceptions to the confirmation of the sale, revoke the order, and dismiss the petition.

Charles E. Morris, Esq., for exceptions.

Edwin Walton, Esq., contra.

[Leg. Int., Vol. 30, p. 148.]

ESTATE OF HENRY J. BIDDLE, DECEASED.

1. Under a direction in a will to pay over to testator's widow the whole income of two-thirds of his estate, devised in trust for his children, to be used and applied by her to the maintenance, support, and education of the children, the whole income, however large, must be paid to the widow.
2. Whether the widow is entitled to a beneficial interest in such income. *Quære.*

Opinion delivered *May 3, 1873*, by

PAXSON, J.—This case comes up upon exceptions to the report of the auditor. The testator died in 1862. By his will he devised and bequeathed to his wife, Mary D. Biddle, one-third part of the residue of his estate, and the remainder of the residue to his executors, in trust to collect and receive the income, and pay the net income thereof to his said wife, "so long as she shall remain my widow, and my children shall be under age, to be used and applied by her to the maintenance,

support, and education of my children who may be under age, *but without being called upon to give any account of the manner in which she may have applied it*; as it is my wish that she shall have the absolute control of its use and disposition as long as she shall remain my widow," etc.

The testator nominated his wife so long as she remained his widow, and no longer, executrix of his will, and one of the guardians of the persons and estates of his children; he also nominated his brother, Alexander Biddle, and his brother-in-law, William M. Baird, executors and guardians of the persons and estates of his children with his wife during her widowhood, and sole guardians and executors on her second marriage.

The income of Mr. Biddle's estate at the time of his death was about \$10,000 per year. It has since greatly increased in value, and now yields an income of about \$30,000. Of this sum one-third belongs to the widow absolutely in her own right. The remainder, about \$20,000 per annum, by the terms of this will, is payable to the widow, to be used and applied by her, as before stated, to the maintenance, support, and education of the children. The auditor has awarded her the whole income of the estate. To his decision the other executors except, upon the ground that the widow is but a trustee for the minor children as to the two-thirds of the income, and that inasmuch as the said two-thirds is more than sufficient to cover any proper expenditure for said children, the surplus should be set apart and invested for the use of said minors.

The widow, on the other hand, asserts that she takes a beneficial interest under the will as to the two-thirds, and is entitled to have the same paid to her, without any liability to account therefor.

The testator left five children, all of whom are still living, the oldest being now about seventeen years of age.

They reside with their mother, and have all the advantages which are proper for their estate and condition in life. It does not appear that Mrs. Biddle has failed in any respect to perform her whole duty to said minors. Not a word was said upon the argument to induce us to suppose that the large trust reposed in her by her husband has been misplaced.

It is not claimed by the exceptants that they have a right to call upon the widow for details of her management and expenditures for the children. They merely insist that a sum liberal and ample should be set apart for their support, and the balance invested. It is urged in support of this view, that the testator could not have supposed, when he made his will, that his estate would yield so large an income.

It is a sufficient answer to this, to say that this testator gave to his widow an absolute discretion as to the expenditure of the said two-thirds of the income. So great was his confidence in her, that he says she shall not be called upon for any account; and that it is his wish that she shall have the absolute control and disposition of it. It is true that he may not have anticipated such an increase in the value of his estate. But he probably knew it was subject to fluctuations. He did not see proper to impose any limitation upon Mrs. Biddle's discretion. We will not do so in the absence of any allegation that she is abusing it. To enable us to properly control her discretion, if we have the right to do

so, it must be alleged and proved that she is not exercising it in a proper manner.

I have not touched the question as to whether the widow is entitled to a beneficial interest in the two-thirds of the income. Upon this point the auditor says:

"The auditor is of opinion that Mrs. Biddle is entitled to receive from the trustees the whole of the net income of two-thirds of the testator's estate, and that she is entitled to apply to her own use, and as the owner thereof, any surplus that may remain, after providing for the education and maintenance of the children of the testator."

A number of cases are cited by the learned auditor in support of this view. The most important of which are *Brown vs. Paull*, Simons' New Series, 92, 1850; *Hadow vs. Hadow*, 9 Simons (438), 1838; *Berkely vs. Swinburne*, 6 Simons (*613), 1834; *Byrne vs. Blackburn*, 26 Beavan, 41, 1858.

I do not now decide the broad principle as stated by the auditor. It is not necessary for the purposes of this case. I do not desire to pre-judge the rights of these minor children upon their respective arrival at majority; all I decide is, that the said two-thirds of the income of the estate should be paid over to the widow, under the terms of her husband's will. Subject to this modification of the views expressed by the auditor, the exceptions are dismissed, and his report is confirmed.

George M. Conarroe and *George W. Biddle*, Esqs., for Alexander Biddle, expleant.

E. Spencer Miller, Esq., for Mrs. Mary D. Biddle.

[Leg. Int., Vol. 30, p. 176.]

ESTATE OF WILLIAM J. MOORE, A MINOR.

The court will not order the sale of real estate of a minor where there is a doubt as to his title, as it might deter bidders and sacrifice the property.

Opinion delivered May 17, 1873, by

PAXSON, J.—This was a citation upon the guardian to show cause why he should not be dismissed, and why the order of sale heretofore granted should not be revoked. The dismissal of the guardian was not pressed at the argument, and may be regarded as abandoned. We are asked to revoke the order of sale upon the ground that the interest of said minor in the real estate, described in said petition, is contingent upon his arrival at twenty-one years of age. The devise to said minor is in the following words, viz.:

"I give and bequeath unto my wife, Maria, all the property which I may die possessed of (except the articles hereinafter mentioned), so long as she shall remain my widow, and upon her decease or marriage, whichever may first happen, then I give and bequeath my said property to my son, William James Moore, his heirs and assigns forever; and if he, my son, William James Moore, should depart this life before he is twenty-one years of age, the said property I give and bequeath to my brother, W. J. Moore's son, Alexander Moore, his heirs and assigns forever."

The widow died December 24, 1872. The person now objecting to the sale is Alexander Moore, guardian of Alexander Moore, Jr., a minor, and devisee above named.

It is clear that, under this will, William takes an estate in fee. Is it absolute, or is it contingent upon his arriving at twenty-one years of age, with an executory devise to Alexander? "By executory devise, a fee, or other less estate may be limited after a fee, and this happens when a deviser devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A. and his heirs, but if he dies before the age of twenty-one then to B. and his heirs this remainder, though void in a deed, is good by way of executory devise:" Black. Com., book 2, 173. I am not aware that this rule so clearly laid down by Blackstone has been modified in Pennsylvania. Justice Sharswood, in his very full and complete notes to the last edition, does not refer to any change.

It was urged by the learned counsel for the guardian that, by reason of the death of the first taker (the widow) before the arrival of William at full age, the estate vested in the latter absolutely; and *Parker's Appeal*, 10 P. F. S. 141, was cited in support of this view. No such question arose in that case. The point was, whether, under the will, Joseph Rex took an estate in fee or in tail. Here the question is, whether William took a vested estate in fee, subject to be divested in case of his death before twenty-one years of age. This will manifestly limits a fee after a fee, which can only be done by executory devise. The doctrine of executory devises, as existing in Pennsylvania, is recognized in *Dunwoodie vs. Reed*, 3 S. & R. 441, and a number of subsequent cases.

I do not now propose to decide more than is necessary for the purposes of this motion. No judgment of this court upon this proceeding would be conclusive upon the question of title. It would settle no one's right. It is enough to say that it would be unwise to sell the real estate of a minor in a case where a serious question of title may be raised. It might deter bidders and result in a sacrifice of the property. We think there is such doubt as to this title, and, therefore, revoke the order of sale.

George D. Budd, Esq., for citation.

James D. Bennett, Esq., contra.

[Leg. Int., Vol. 30, p. 200.]

IN THE MATTER OF THE ESTATE OF PATRICK BRADLEY, DECEASED.

The Orphans' Court cannot, upon petition of the administrator d. b. n., grant a citation upon the removed administrator to *forthwith* hand over all properties of the estate. It may compel him to file an account.

Opinion delivered *June 14, 1873*, by

ALLISON, P. J.—The citation in this case was granted on the application of the administrator d. b. n. to show cause why James Bradley and Robert Soltz, to whom administration had been granted, but whose letters had been revoked, should not file an account of their administration of said estate, and forthwith hand over and deliver to the present administrator all the moneys and other property belonging to said estate.

The inventory shows that property to the amount of \$3596.54 was received by the discharged administrators, which it is their duty to account for, and pay over to their successor in office without unreasonable delay; but the question is, have the court the power to direct this to be done before a settlement of their accounts, and can this duty be enforced

in the manner here prayed for, by order and by attachment in default of obedience to the same?

It was the duty of the register before granting letters to the discharged administrators to require adequate security from them for the proper performance of the duties of their office; and in the absence of proof to the contrary, or even an allegation that this has not been done, we are to presume that the register has seen to it, that no harm can fall upon the estate for want of that protection which it was obligatory upon him to obtain from the administrators first appointed.

The act of February 24, 1834, sec. 31, provides that "administrators *de bonis non*, with or without a will annexed, shall have power to demand and recover from their predecessors in the administration, or their legal representatives, all moneys, goods, and assets remaining in their hands, due and belonging to the estate of the decedent, and to commence and prosecute actions upon promises made to such predecessors in their representative character, and to sue forth and defend writs of error, writs of *scire facias*, and writs of execution upon judgments, obtained by or in the name of the executors or administrators into whose place they may have come, and also to proceed with and perfect all unexecuted executions, which may have been issued thereon at the instance of such predecessors: *Provided*, That when any suits shall have been brought by an administrator *de bonis non* for the recovery of moneys, goods or assets, remaining in the hands of his predecessors, or their legal representatives, before they shall have settled their final administration account, the court in which such action shall be brought shall have power to stay the proceedings therein on the defendants filing such account in the register's office of the proper county, twenty days previous to the term next succeeding that to which the writ was returnable, until said account shall have been finally settled and adjusted, and on the production of a certified copy of said account, so settled and adjusted, the court in which such suit shall be pending is hereby authorized and required to render judgment for the balance, which shall thereby appear to be due to either party."

But this act, upon which the petitioner relies in support of this application, will, upon examination, be found to be wholly wanting in the element of power conferred upon the court to coerce by summary process the handing over of the assets of this estate, shown by the inventory to be in the hands of those who had wrongfully obtruded themselves into the administration. Administrators *de bonis non* may demand and recover from their predecessors in the administration, or their legal representatives, all moneys, goods and assets of the estate which are in their hands, but this demand is a legal demand by an account or by suit; for it is not demand only, but recovery which is provided for in the act. The following portion of the section looks wholly to proceedings by action by *scire facias* and writs of execution; and to the court is given the power to stay actions brought by an administrator *de bonis non* against his predecessors before they shall have settled their final account, and upon such settlement to render judgment for the balance which shall thereof appear to be due to either party. This is its entire scope and purpose.

Nor do the authorities relied upon by the petitioner, in our judgment,

sustain the position assumed by him: *Neld vs. McClure*, 9 Watts, 495, decides, no more, than that an administrator *de bonis non* may maintain an action against the administrators of a deceased executor, who had resigned his executorship, and recover the balance of the estate remaining in his hands. The act of February 24, 1834, above cited, was held to give the authority to sue. The court say it was the duty of the executor, who was allowed to resign his office, with an admitted balance in his hands, to have paid it over to his successor instantler, and then add, "that as it was the executor's duty to pay the balance, *an action* lies to recover it; that is, the duty may be enforced by action brought by the administrator *de bonis non*." There is nothing here which gives the right to the Orphans' Court to proceed by a peremptory order to direct the handing over of the assets of the estate by the discharged executor.

Drenkle vs. Sharman, 9 Watts, 485, holds simply to the duty of a judgment creditor to proceed by *scire facias* against the administrator *de bonis non* of the original debtor, who is bound to collect the assets of the estate which remained in the hands of the first administrator and apply them to the payment of his debts. And in *Commonwealth vs. Strohecker*, 9 Watts, 479, the decision is, that an administrator *de bonis non* can alone maintain *an action* to recover the assets of an estate remaining in the hands of a deceased administrator.

In no one of these cases was it contended that the court had power, upon petition of the administrator *de bonis non*, to order the predecessor in the administration to pay over the balance of the estate in his hands. The duty to pay over is firmly maintained, and the right to enforce that duty *by suit* is clearly recognized.

Under the act of March 29, 1832, relating to delinquent executors, administrators or guardians, the power is given to the court to direct payment of the goods and chattels of an estate, in the hands of one dismissed from his office, for the causes therein mentioned, to his successor. This may also be done under the act of May 1, 1861, where an executor, etc., is wasting and mismanaging the estate; but, in the case before us, we find ourselves without the power to deal with the superseded administrators by order to pay over, and can grant no more of the prayer of the petition than that which asks for an account, which is ordered to be filed within one week from this date.

Daniel Dougherty, Esq., for petitioner.

W. H. Ruddiman, Esq., contra.

[Leg. Int., Vol. 30, p. 224.]

ESTATE OF THOMAS A. HAUGH, DECEASED.

An auditor can only charge the amount allowed by the act of 1870, unless his fee is agreed to by the counsel of *all* the parties in interest or is fixed by the court.

Opinion delivered *July 5, 1873*, by

PAXSON, J.—The only question raised in this estate relates to the fee of the auditor. We regret that the necessity exists for the determination of such issues by the court. But it does exist, and it must be met.

The whole amount in the hands of the accountant for distribution was \$909. Out of this sum the auditor charged a fee of \$250. The net balance of the estate, \$535.38, was awarded to the mother of the

decendent under the terms of his will. Exceptions were filed by a creditor to the report of the auditor in ruling out his claim. No one, however, excepted to the auditor's fee. The exceptions filed were dismissed, and the report confirmed by the court on May 17, 1873. Subsequently an order of court was obtained upon the executor to pay the balance of the auditor's fee, fifty dollars having been previously paid on account thereof. At this point objection seems to have been made by the executor to the fee, but the subsequent steps by which the matter found its way into court do not clearly appear by the paper books. Nor is it very material, as we will sweep away all technicalities in order to reach the justice of this case. Enough appears, however, to show that the report was referred back to the auditor to report as to "the amount of compensation agreed upon for the auditor." The latter reports as follows: "The auditor finds as a fact, and so reports to the court, that the matter of compensation for the auditor was made a matter of agreement between the auditor and George W. Arundel, Esq., attorney for the executor and accountant, and with Edward S. Campbell, Esq., attorney for William Price's executor, and the compensation of the auditor was fixed at \$250, as charged in the report filed April 4, 1873."

The depositions of Mr. Campbell and of the auditor were submitted, to show not only that the former agreed to the above named sum as the proper fee for the auditor, but that Mr. Arundel, who excepts thereto on behalf of the executor, was willing to allow a fee of \$300. Mr. Arundel, while admitting his assent to the fee, alleges that it was subject to the approval of his client.

The value of the finding of the auditor, and the depositions in support of it, may be appreciated when the fact is stated that the parties represented by the learned counsel referred to have no interest in the fund out of which the fee is payable. The entire amount is awarded to the mother of the testator under the will. She appears not to have been represented by counsel.

The auditor further reports (supplemental): "That on the 13th day of June, 1873, exceptions were sent to the auditor by George W. Arundel, Esq., attorney for the accountant. The auditor has not annexed them to the report, being of the opinion that the leave of the court should be first obtained, and that without this he has no authority to annex them. That the finding in this report is not such an one as entitles parties to file exceptions, it being only referred back to supply an omission of the auditor in making his final report, and in nowise opening the confirmation of the report."

We now allow the exceptions referred to to be filed *nunc pro tunc*, and for that purpose will open the confirmation of the auditor's report.

In *Milligan's Estate*, L. G. Reps., vol. I., 203, we had occasion to refer positively to the eighth section of the third rule of this court, and to the act of assembly of 14th of April, 1870, fixing the compensation of auditors. The rule referred to is as follows:

"In all cases in which auditors and examiners shall be appointed in the Orphans' Court, or in which auditors, masters and examiners shall be appointed in the Common Pleas, it shall be the duty of every such officer to submit the question of the amount of his compensation to

counsel who appear before him, representing persons or parties who are liable to pay the costs of the proceeding, or the costs of the settlement of the estate, or of the distribution of the fund thus referred. And said counsel shall designate the sum which in his or their judgment ought to be paid for the services performed before any amount shall be named or charge made by such auditor, master or examiner. If the amount of compensation suggested by counsel be not satisfactory to such officer, he shall make report thereof to the court, and such charge may be supported by any statement or argument which he may choose to submit in justification of his claim. He shall also, if requested, set forth the objections which have been made thereto. Such report may be made interlocutory, and submitted at any time after the services have been performed."

The act of assembly above cited is in these words: "Whenever auditors are appointed by the Orphans' Court, Court of Common Pleas, or District Court, of the city and county of Philadelphia, in cases where the balance for distribution amounts to \$1000 and upwards, they shall be entitled to receive the sum of \$10 for each day they shall necessarily attend to the duties of their appointment, not to exceed five days, and the additional sum of \$25 for making the report; and in cases where the balance for distribution shall be less than \$1000, they shall each be entitled to receive one-half the above rates as compensation for their services: *Provided*, that in important cases, or cause shown, the court may make a decree or order, allowing such additional compensation as they may deem proper."

In commenting upon the foregoing, this court said in *Milligan's Estate* (before cited): "We propose to enforce both the rule of court and the act of assembly rigidly in all cases brought to our notice by exception. This can be done without in any way interfering with the allowance of proper compensation in cases, in which, by reason of their importance, and the time consumed in their consideration, the maximum fee fixed by law is insufficient. The bar will always find the court ready to deal justly in such matters. But for the same reason we must enforce our own rules and the law of the land."

An auditor's report never comes under our notice unless exceptions are filed thereto. In the latter case, we consider and decide only such points as are raised by the exceptions. Were we to set aside, of our own motion, the action of an auditor, where the parties in interest do not object to it, we should be introducing a novel practice into the Orphans' Court.

Where an auditor charges a greater compensation than is allowed by the act of 14th of April, 1870, it should appear upon the face of his report that the question of his fee had been submitted to and agreed upon by the counsel representing all the parties in interest, as pointed out in the rule of court; or that his fee was fixed by an order of court, as provided for in the said act. The time for an application to the court to enlarge the compensation is before the charge is made, not after exception filed. And if the agreement of counsel under the rule is relied upon, it should be in writing.

An exception filed to an auditor's fee is always an answer to a parol agreement of counsel in reference thereto. Where auditors neglect

these plain provisions, or assume to fix their own compensation at a higher rate than the legal standard, it is our plain duty upon exception filed to sustain the exception.

The auditor has not complied with the act of assembly or the rule of the court. The agreement fixing his compensation, even if not repudiated by one of the counsel, is not entitled to consideration, for the reason that it was not made by the parties in interest. They were merely giving away the money of another person.

The auditor reports that he held some twenty meetings. At how many of them business was transacted does not appear. The practice of prolonging audits, of holding frequent meetings, at which little or no progress is made, is not to be commended. It entails delay and loss upon the estate. Auditors should adhere to some strictness in requiring the attendance of parties and the despatch of business. In all proper efforts in this direction they will be sustained by the court. We see nothing in the report before us to indicate a necessity for more than five meetings.

The fee of the auditor should have reference as well to the amount for distribution as to the labor performed, and importance of the questions involved. This distinction is made in the act of assembly before cited. Especially ought it to be observed in the distribution of small estates in the Orphans' Court, where the parties in interest can ill afford any unnecessary burdens. In the present case, we think the fee charged by the auditor is exorbitant, whether we measure it by the fund in court or the necessary amount of labor involved. To allow it to stand would be a reproach to the administration of the law. The fee to which the auditor is entitled by law is \$37.50. As he has already received \$50 on account, we will fix his compensation at the latter sum, and the balance of the amount claimed by him, viz., \$200, must be added to the amount for distribution, and paid to Mrs. Haugh, the legatee under the will. The executor can do this without any formal opening of the confirmation of the auditor's report. The order upon the executor to pay the auditor's fee is vacated.

[Leg. Int., Vol. 30, p. 225.]

IN THE MATTER OF THE TRUST ESTATE OF HARRIET WARD.

The act of April 14, 1870, regulating fees of auditors, must be strictly observed.

Sur exceptions to auditor's report. Opinion delivered July 5, 1873, by PAXSON, J.—Two accounts were filed in this estate; one by the executor of John F. Lamb, deceased, who was former trustee of Harriet Ward; the other by Edwin L. Stokes, who was appointed by the court trustee of the said Harriet upon the death of the former trustee. The *cestui que trust* is now deceased, and these two accounts form together a continuous account from the creation of the trust until said trust was ended by the death of said Harriet Ward, in February, 1872. Both accounts were referred to the same auditor, to whose report in each case a number of exceptions have been filed.

One of the exceptions is, that the auditor erred in making distribution. It appears that the clerk in making out the certificate of the auditor's appointment, omitted that portion of the order of court which

directs distribution. This exception is so purely technical, that it might well have been omitted. It is dismissed, and the clerk is directed to amend the certificate.

There is also an exception in both reports to the auditor's fee. As the case comes within the ruling in Haugh's estate, just decided, the exception is sustained. In the account filed by the executor of Lamb, the fee is reduced to \$75; in the account filed by Stokes, trustee, the fee is reduced to \$37.50.

I can find nothing to sustain the remaining exceptions to either report. They are not of sufficient importance to render a discussion of them interesting or profitable.

The exception to the auditor's fee in each report is sustained. The balance of the exceptions are dismissed. A decree can be framed to avoid sending the accounts back to the auditor.

John Dolman, Jos. A. Clay and Wm. A. Husbands, Esqs., for plaintiffs.
Edward S. Lawrence, Esq., for the defendant.

[Leg. Int., Vol. 30, p. 272.]

ESTATE OF FREDERICK GAUL, SR.

1. The jurisdiction of the Orphans' Court is wholly statutory, and the facts in this case do not give it the power to grant discovery.
2. An estate given to A for life with remainder to his children living at his death, or the issue of deceased children, gives A only an estate for life.
3. Trustees will only be appointed where the trusts require personal attention or active duty, or the exercise of a power.

Opinion delivered August 7, 1873, by

ALLISON, P. J.—Frederick Gaul died June 1, 1831, leaving a will dated August 1, 1825; as to a portion of his estate he died testate, as to other property intestate. His wife, who survived him, died in 1836. Their children were Frederick and William, who with his widow were made executors of his estate; Martin; Joseph, whose share lapsed, having died unmarried, before his father; Jacob and Catharine, the first of whom is dead, the shares of both being devised in trust; Catharine, still living, old and unmarried; Mary and Elizabeth.

Estates in fee were given to Frederick, Martin, William and Joseph. To Mary and Elizabeth estates for their separate use for life, etc.; to Jacob and Catharine estates in trust for life, after death to their children then living, and the issue of such as should then be dead, their heirs, etc. Testator directed that Jacob's share should remain under the care of his executors, as trustees, who were directed to pay income to him for life, or at their option to apply the same to his support, so that he should not have power to dispose of the same, and that it should not be subject to his debts.

William and Frederick, executors of Frederick Gaul, Sr., are both dead.

We have before us seven petitions, and proceedings thereon, which, from their complication of facts, affirmed and denied, in every phase, in which they have been presented, the confusion of parties, and the varied interests in which they stand, upon the questions presented for the consideration of the court, make the case one of more than ordinary difficulty.

We propose to do little more than state the general conclusions at which we have arrived.

Petition No. 1 prays, that in the interest of William Gaul's estate, a citation may be granted, requiring Frederick Gaul and James S. Huber, who married a granddaughter of Frederick Gaul, Sr., to account, alleging that they have property to a large amount in their hands, belonging to the estate; and that Edwin M. Lewis, intermarried into the family of the testator, be also cited to show what securities of the estate are under his control.

Upon this petition we hold that the Orphans' Court have not the power to order the discovery which is sought at the hands of Edwin M. Lewis. *Schollenberger's Appeal*, 9 Har. 337; *Snyder's Appeal*, 12 Cas. 166. The jurisdiction of the Orphans' Court is wholly statutory, and no such power is conferred upon the court. *Brinker vs. Brinker*, 7 Barr. 55; *Williams' Appeal*, 15 P. F. S. 265.

As to Huber, it appears, that though appointed trustee by the court, before the death of Frederick or William Gaul, who had misbehaved in the administration of the trust, he never took upon himself the duties of trustee, but refused to qualify or to give the security ordered by the court. He was agent of the trustees, and as such could not have been cited by parties in interest to account, nor does his relations to the estate appear to have changed after the death of the trustees, Frederick and William. Nor after the death of Henry Stiles, his father-in-law, who was himself a son-in-law of Frederick Gaul, Sr., and who appears to have been associated in the management of the trust, first with Frederick Gaul, to the exclusion of William, the co-trustees of Frederick, under the will of their father, and after Frederick's death, to have had the sole management of the trust estate. He does not, however, appear to have been a duly constituted trustee at any time. If the principle be relied on, that trusts are to be enforced against all persons who come into possession of trust property, with notice of the trust, the statutory right of the Orphans' Court must also be shown, before it can take jurisdiction of the person, against whom a citation may be asked. It is true the act of March 29, 1832, does give to the Orphans' Court jurisdiction, where executors, administrators, guardians or trustees, may be possessed of, or are in any manner accountable for any real or personal estate of a decedent; but this does not make subject to the jurisdiction of that court, one who seems to have acted solely in the capacity of *agent* for a trustee, executor, etc. Mr. Huber does not seem to have stood at any time, in any other relation to the trust property than as agent for the trust estate, or as custodian or care-taker of the property, belonging to the trust. His appointment by the court after the death of Henry Stiles, and his refusal of that appointment, upon the conditions imposed by the court, seem to settle this question against the prayer of the petitioners. He cannot, we think, be regarded as a trustee, under the act of March 29, 1832. Nor does he appear to have acted in such a manner, that he can be considered even as a trustee *de son tort*. We refuse, therefore, the citation prayed for, as to Huber.

As to citation to Huber to file trust account of Frederick Gaul, trustee. This, we think, ought to be granted, upon suggestion of his death, and substitution of his executors upon the record.

Petition No. 2 is by James S. Huber, as administrator of Jacob Gaul's estate, for an account from the executors of William and Frederick Gaul. The answer says this cannot be done, because the papers are not in their possession, and that William Gaul had ceased to act.

This is denied by replication.

The respondents further set up, that Huber, as administrator of Jacob, had no interest; and upon this ground they demur to the petition. Huber has no standing if Jacob Gaul took only a life-estate under the will of his father. Our judgment upon this point is, that Jacob's interest was that of a tenant for life only, and that he did not take a fee or a fee tail, as petitioners contend.

The estates to the daughters, and to Jacob, were but life-estates, with contingent remainders to their children, living at their death, or the issue of deceased children. Until the happening of the contingency, and vesting of the remainders, the fee descended to the children of Frederick Gaul, Sr., as his heirs at law. The case of *Haldeman vs. Haldeman*, 4 Wright, 15, seems to rule this question, "The words child or children, by which remaindermen were described, are in their usual sense, words of purchase, and are always so regarded, unless the testator has unmistakably used them as descriptive of the extent of the estate given, and not to designate the donees." This conclusion is, we think, also sustained by *Guthrie's Appeal*, 1 Wright, 14; *Chew's Appeal*, 1 Wr. 23; *Walker vs. Milliken*, 9 Wr. 178; *Fetrow's Estate*, 8 P. F. Smith, 424; *Buzby's Appeal*, 11 P. F. S. 111.

Yarnall's Appeal, 4 Legal Gazette, 179, is not, we think, against this conclusion. There the trust was, to pay income for life to daughters, with power of appointment given to the daughters by will, and in default of such appointment, to such persons who would take the estate had they died intestate *seized thereof in fee*.

Nor is *Ogden's Appeal*, 29 Legal Intelligencer, 165, an authority for the position assumed by the petitioners. The court held, that the language of the will and the intent of the testator carried the fee to the first taker.

Nor can an account of accretions of unpaid income be demanded. The income was not, in any way, at Jacob's disposal. The trustees were to appropriate income for Jacob's support, or were authorized to pay income to him. *Horwitz vs. Norris*, 13 Wr. 212, is strongly in point; there the direction was to pay over net income for maintenance for life. This was held not to create a legal or equitable estate for life, in the lands; the tenant could not sell or dispose of his interest, as life-tenant, nor could he dispose of the same by will. See also *Shankland's Appeal*, 11 Wr. 113.

In relation to Petitions 3 and 4, it is sufficient to say, that the question of the liability of William Gaul's estate to Mary Smith and Catharine Gaul, depends upon whether William Gaul was ever accountable. This is positively denied, and the question thus raised depends upon a question of fact, to be settled by the proofs. These petitions and answers should be referred to an examiner to take testimony.

Petition 5 prays that Huber be appointed trustee. This is, I take it, the application under which the appointment of Huber was ordered by the court, and which he refused to accept, upon the condition of entering security.

Petition 6, presented in the William Gaul interest, asked for the appointment of the Fidelity Trust Company, as trustee under the will of Frederick Gaul, Sr., in place of Frederick and William, deceased, which was granted; and Petition No. 7 prays, that this appointment be vacated. This application is in behalf of all but the representatives of William Gaul, and rests upon two grounds: First, a want of jurisdiction; there being, as contended, no vacancy, because no subsisting trust. Jacob was dead, and the trust as to him died with him. Catharine's trust is a *feme covert* trust, and as she is unmarried, old and insane, the trust as to her is executed. Mary Smith's trust became executed on her becoming a widow; she has children; and William Gaul's executors, therefore, have no interest. The executors of Frederick Gaul, surviving trustee, hold the legal title to the chattel property of the estate, and can maintain possession till required to account, and as these trusts are executed, and not executory trusts, equity has no jurisdiction. *Baker vs. Biddle*, 1 Bald. 314; *Ex parte Conrad*, 2 Ashmead, 329. This last case is rested mainly on the authority of *Carlisle's Appeal*, 9 Watts, 381, in which the doctrine is clearly stated, that under our acts of assembly, relating to trust and trustees, that only where the trusts are active, requiring personal attention or active duty, or the exercise of a power by a trustee, will trustees be appointed.

This renders it immaterial, whether the appointment was improvidently made or not. Holding that the trusts were dry trusts, the Fidelity Company ought not to have been appointed, and the appointment is therefore revoked.

Geo. W. Biddle, W. W. Juvenal and C. S. Pancoast, Esqs., for the William Gaul interest.

Chapman Biddle and Richard L. Ashhurst, Esqs., for the other heirs and parties in interest.

[Leg. Int., Vol. 30, p. 380.]

ESTATE OF JAMES RAFFERTY, DECEASED.

The Orphans' Court has no jurisdiction to entertain bills by strangers to proceedings for specific performance of decedent's contract to rescind such decrees.

Semble: That a purchaser of the legal title, for value, and without notice, prior to the proceedings for specific performance, would not be affected by them.

In the matter of the petition of Charles W. Zimmerman to vacate a decree for specific performance. Opinion delivered *November 15, 1873*, by

PEIRCE, J.—James Rafferty died in 1858, leaving issue three children, Sarah, William, and James, and his wife, Catharine, whom he appointed executrix. He devised one-third of his real estate to his wife, and two-thirds to his sons, William and James, and the survivor of them. He provided for his daughter otherwise. The decedent's two sons died in their minority, the eldest and survivor of them on the 16th of January, A. D. 1872.

In April, 1872, M. A. Kane, as assignee of Patrick Harvey, presented his petition to the Orphans' Court, setting forth that the decedent in his lifetime had made a written agreement with the said Harvey, on certain conditions therein set forth, for the sale of the said real estate to

the said Harvey, and praying the court to decree a specific performance of the said contract. An answer was put in by the executrix admitting the facts set forth in the said petition, and submitting to the adjudication and decree of the court. And thereupon, on April 20, 1872, a decree of specific performance was made as prayed for.

On the 17th of September, 1871, the petitioner, Charles W. Zimmerman, bought at sheriff's sale the property northeast corner of Seventh street and Passyunk road, part of the real estate of which the said decedent died seized, as the property of Catharine McIlwain, formerly Catharine Rafferty, on a judgment against her, which was conveyed to him by sheriff's deed, dated September 21, 1871.

On May 4, 1872, Charles W. Zimmerman presented his petition to the court, praying that the said decree of specific performance be vacated on the ground of want of notice to him, and some alleged inconsistencies referred to in said petition. To this petition answers were put in by the executrix and M. A. Kane, in whose favor the decree of specific performance had been made, and the case is submitted on petition, answers and proofs.

This case seems to be ruled by the case of *Weyand vs. Weller*, 3 Wright, 443, in which Thompson, J., said: "It seems to have been forgotten that the Orphans' Court is a court of limited jurisdiction. Its jurisdiction is well defined, and while it has unquestionable jurisdiction to decree the execution of contracts of decedents, yet it would be difficult to find its authority to entertain bills by strangers to such decrees to rescind its orders for specific execution."

Furthermore, it is not very apparent how the interests of the petitioner have been affected by this decree for a specific performance. Whatever his rights are they were acquired before the proceedings for the specific performance were commenced. And if he was a purchaser for a valuable consideration, without notice, upon a valid judgment against the devisee, his rights, whatever they may be, would seem to be independent of the proceedings in the Orphans' Court for the decree of specific importance.

The petition is dismissed with costs.

[Leg. Int., Vol. 30, p. 392.]

ESTATE OF JOHN BOYD, DECEASED.

Construction of will—The word "or" read "and," to give effect to the manifest interest of the testator as gathered from the whole will.

Exception to auditor's report. Opinion delivered *November 23, 1873*, by

LUDLOW, J.—Upon consideration of the whole will in this case, we are of the opinion, that the auditor was right in the conclusion to which he has arrived, and upon which he distributes the estate.

While we agree with the learned counsel for the exceptants as to the principles of law applicable to the case, we cannot apply those principles as he desires, when we consider the facts before us. It is true, and has many times been decided, that evidence of surrounding circumstances, and declarations of a testator, will not be received except in cases of latent ambiguity; but where the real intention of a testator can be

gathered from the will we are bound to follow it, except where we are restrained by technical words which will admit of but one legal construction.

The disjunctive conjunction, "or," is not a technical word, and the courts substitute the copulative conjunction "and" when it is necessary to carry out an evident intention. *Kelso vs. Dickey*, 7 W. & S. 279. Looking at the whole scheme of this will, it is manifest that this testator intended first to protect his widow, his daughter and a grandchild. Three contingencies might render necessary a departure from this scheme. The marriage of the widow, the departure of the daughter from home, or her marriage, and the marriage of the son-in-law, coupled with an inability upon his part to maintain and support his children by testator's daughter.

No room for doubt exists in the construction of this will upon the happening of the first two contingencies, and therefore the will speaks upon these points with precision, and for the reason that in the nature of things no room is left for conjecture; when, however, the testator contemplated the possible change in the domestic condition of the son-in-law, whereby he might be unable to support the children of a first wife, he says, if he "shall marry, or shall for any cause become, in the judgment and opinion of my executors, unable properly to maintain and educate his children," then they shall receive one-third of the income.

Why should the widow be required to support one of the grandchildren, by the very terms of this will, so long as she remains a widow, and yet be deprived of a portion of the very fund out of which she is to maintain him?

It is useless, we think, to argue that Albert will be maintained by his father, should the construction contended for by exceptants prevail, for the widow is to receive the income of the estate, among other conditions, upon providing a support for "Albert Dewald, who now lives with us."

The evident fear of the testator was, that his son-in-law, by a second marriage, might be burdened by a second family, or might in some way be in indigent circumstances, and the whole scope of this paragraph looks to this possible condition of affairs, for in any event the executors are to decide the question, and therefore are vested with a discretion in the matter.

More light is thrown upon this will by a consideration of that clause in it which, within a few paragraphs, follows the disputed sentences heretofore noticed, wherein the testator, as if anxious to protect his widow, so long as she remains unmarried, again by implication declares that she is not to be deprived of her income while she continues in her condition of widowhood, but should she marry, then these children are to receive the income and principal of one-third of the estate.

This is a case in which it is right first to look at the whole will, and then to give effect to the evident intention of the testator by reading "or" "and" in the paragraph in dispute.

The auditor has in his own way reasoned upon the facts presented to him, and upon the intention of the testator as derived from the words of the will, and we do not see that he has made a mistake.

The exceptions are mainly directed to the construction of the will, and those which dispute the facts, as found by the auditor, cannot be

taken into consideration, for the parties are bound by the conclusions of the auditor, when they omit in proper time to ask for an issue according to our practice. *Beehler's Estate*, 3 Ph. R. 254.

The exceptions are dismissed and the report is confirmed.

W. C. Hannis, Esq., for the estate.

R. P. Wilson, Esq., for exceptions.

[Leg. Int., Vol. 30, p. 404.]

ESTATE OF SARAH L. KEENE, DECEASED.

Where duties are required of trustees, to invest, pay over, etc., and where the trust is for the use of a married woman for life, remainder to her children, the trust is alive and will be maintained.

Exceptions to auditor's report. Opinion delivered November 29, 1873, by

ALLISON, P. J.—The most important exception to the report of the auditor raises the question, whether under the will of the testatrix, a trust exists as to the bequest of \$30,000, and the residue of the estate, to Ellen Keene Mitchell, and as to a bequest of \$10,000 to Henry E. Keene, who stood respectively in the relationship of niece and nephew to the testatrix.

The auditor holds that the executrix had no trust to perform, and that she must pay, or transfer the securities belonging to the estate, to the legatees respectively, upon their giving the security required by the act of assembly, in case of payment of principal to a legatee for life. This conclusion is founded chiefly on *Parker's Appeal*, 11 P. F. S. 478. He says the form of the bequest in *Parker's Appeal* is substantially, and indeed, almost identically the same with that employed by Miss Keene. Isaac Brown Parker, among other provisions of his will, bequeathed to each of his daughters the sum of \$50,000, the interest to be paid to them during life, and the principal to their children at their death. Miss Keene's will is as follows:

"I also bequeath to this dear niece" (Ellen Keene, now Mitchell, the executrix) the sum of \$30,000, to be invested in ground-rents, or bonds and mortgages on real estate, the interest to be paid to her only, or her power of attorney, whether married or single, during her life; and, after her death, to her children, if any, absolutely; but if she dies without issue, the principal to go to her brothers, Henry and James, namely, the aforesaid investment of \$30,000 in ground-rents, and bonds and mortgages, the interest only for their uses, but to their children, lawful issue, absolutely.

"I give and bequeath to my nephew, Henry Edgar Keene, \$10,000, to be invested in ground-rents, or bonds and mortgages on real estate, the interest only to be paid to him during his natural life; if he marries and has children, to his lawful issue absolutely; if he dies unmarried, this sum to be divided between his two or one surviving brother and his sister, subject to the same investment, and receiving the interest only of the same during their lifetime.

"The residue of my estate, real and personal, I give and bequeath to my dear and affectionate niece, Ellen Keene, subject to the same conditions as my legacy of \$30,000, specified in a former part of this instru-

ment, the principal to be invested in ground-rents, or in the bank-stock considered safe, but preferable in bond or mortgage on real estate, the interest to be *enjoyed* by her during her life, the principal to devolve to her children, lawful issue, absolutely; if she dies unmarried, she has power to devise it to whichever of her brothers she will consider most worthy to inherit her bequest and mine, the interest only to them, to their children, lawful issue, absolutely."

In the case of *Austin Keene's Appeal*, 14 P. F. S. 268, the court decided that the petitioner, who was the son of a deceased brother of the testatrix, possessed such a contingent interest in the estate of his aunt, as to give him the right to an account, under the act of the 17th of April, 1869, P. L. 70. The only fact upon which the decision turned, was the existence of a contingent interest in Austin Keene, and in a search after such an interest, it of course became necessary to look through the will of Sarah Lukens Keene; as the result of that examination, the opinion is stated, that the niece took but a life-estate with limitation over absolutely to her children, and that if the nephew, Henry E., died without leaving issue, the legacy of \$10,000 bequeathed to him for life would pass into the residue.

The question of the existence of a trust for Ellen and Henry for life, is for the first time presented for consideration.

In *Bacon's Estate*, 6 Phila. Rep. 335, this court held, that a trust to receive and pay over the income of real and personal estate to a married woman for life, and at her death to convey to her right heirs in fee simple, is an active trust, which does not cease on discovery, but continues until the death of the *cestui que trust*. This was affirmed by the Supreme Court in *Bacon's Appeal*, 7 P. F. S. 504. When the question was before this court we held, confirming the report of the auditor, that a trust to receive and pay over income, was an active trust; and to be distinguished from a trust to permit one to receive and take to himself rents and profits. Judge Strong, delivering the opinion of the court in *Bacon's Appeal*, says, duties are imposed upon the trustees beyond that of passively holding title; and they were constant and continuous, not at all dependent upon the coverture of Mrs. Bacon or any of her daughters. He quotes with approval, the remarks of Mr. Justice Sergeant in *Vaux vs. Park*, 7 W. & S. 19, that unless the distinction between an active and a passive trust be regarded, their existence cannot be preserved. So long as active duties remain to be performed by trustees, the legal estate must continue in them, to enable the performance. The language of the last codicil of the will of John Warder ruled the decision in that case. It reads, "in trust as aforesaid, and the income of the respective portions shall be received by my said sons as trustees, and paid over to my said daughters respectively, for their sole and separate use, to each daughter during life." The income was to be *received* by the trustee, and *paid over* to the daughters of the testator. Nothing more.

The same doctrine is held in *Barnett's Appeal*, 10 Wright, 893. The devise was to trustees of real and personal property in trust to lease real estate, to keep personal property invested on bond and mortgage, or other safe security, to collect and receive the rents, interest and profits, and pay over for life the net income to a son and daughter of

the testator. It was held that this constituted an active operative trust; that the use was not executed even though all the *cestui que trust* were *sui juris*. *Kuhn vs. Newman*, 2 Casey, 227, and kindred case which followed, were swept away by this decision. Trusts were held active, where the duty was to receive profit and pay it to another; or where the trustee is to dispose of property or pay rents over to a *cestui que trust*; or apply them to his maintenance; or make repairs; or pay annuities; or manage the estate for the interest of the *cestui que trust*; or to pay the rents to a married woman. *Graham's Appeal*, 16 P. F. S. 477, affirms the same doctrine, which is also supported by the case of *Barclay vs. Lewis*, 17 P. F. S. 316. *Keyser's Appeal*, 7 P. F. S. 236, might seem to conflict with these cases, but upon examination the contrary appears; it is rested on the fact, that so far as the interest of the sons was concerned, all the active duties of the trust terminated with the partition of the estate. Judge Sharswood remarking, there can be no doubt, on the cases in Pennsylvania, that if this devise had been for the sons for life, with the power of appointment by will, and in default of appointment, then to their heirs, the trust would have been kept alive, as an active trust. He cites in support of this opinion 2 Rawle, 33; 7 W. & S. 19; 12 Casey, 338; 10 Wright, 392, and 11 Wright, 113.

We think it may be affirmed that the broad doctrine that a trust to invest and keep invested a fund, to receive and pay income or profit to another, constitutes an active trust in Pennsylvania, and that it has not been overthrown by the case of *Parker's Appeal*. In the case before us we have the sum of \$30,000 and the residue of the estate given to the executors, of whom Ellen Keene Mitchell was one, first to be invested in ground-rents, or in bonds and mortgages, second, the interest to be paid during her life to Ellen Keene *only*, or to her attorney, whether she married or remained single; and after her death to her children absolutely. If the testamentary disposition of this portion of the estate ended at this point, it could not be rightfully claimed "that the form of the bequest in *Parker's Appeal* is substantially, and indeed almost identically, the same as that employed by Miss Keene." It would yet be wanting in a direction to invest the legacy in specified securities, and to keep it so invested for the life of the first taker, and with the power given to her to dispose of the residue by will in case she did not marry. When to this is added the duty upon the part of the executors to hold the property, and pay the same to contingent devisees in case Ellen Keene should die unmarried, the income to be paid for life to said devisees, with remainder to their children absolutely, we think that it presents the case of a bequest, which is not substantially nor identically the same as *Parker's Appeal*. But when to this is added the fact that there is a sole and separate use for Mrs. Mitchell during her marriage, the divergence from *Parker's Appeal* becomes more apparent, the interest is directed to be paid to *her only*, or to *her attorney*, whether married or single. Miss Keene, the testatrix, made her will in 1843, and died in 1866. Ellen Keene married her present husband in 1857, and together with her husband resided with the testatrix for several years before her death. It was, therefore, with the full knowledge of all the facts that Sarah Lukens Keene allowed her will to remain for years unaltered in this respect,

until it took effect upon her death, thus securing to Ellen Keene Mitchell, to the exclusion of her husband, the payment of the interest for her life. That a separate use was intended cannot, we think, be questioned; the income was to be paid to *her only*, or upon her power of attorney. This brings it within the general principle, that whenever it appears that the wife is intended to have property for her sole use, that intention will be carried into effect by a court of equity. In a conveyance made directly to a wife, any words which sufficiently show the intention to secure a use to her, or to separate for her benefit, the use from the title, must also indicate an intention to exclude the husband. *Griffith vs. Griffith*, 5 B. Monroe, 116.

There is no particular form of words necessary for the creation of such an interest; the question is one of intention, and is to be solved by the established rules of interpretation. For a general statement of the law on this subject see Cord on Legal and Equitable Rights of Married Women, chapter 22. In our State we have the cases of *Jamison vs. Brady*, 6 S. & R. 466, and *Heck vs. Cleppinger*, 5 Barr, 385, in which the expressions "for her own use," and "to be for her and her family's use during her life," were held each to establish a separate use; and in the latter case, though no trustee is named. To the same point are *Cochran vs. O'Hearn*, 4 W. & S. 95; *Snyder vs. Snyder*, 10 Barr, 423; and the very strong case of *Tyson's Appeal*, 10 Barr, 220, where the expressions of the testator—to my sister, H. T., inter-married, etc., the interest to be paid to her in equal half-yearly payments yearly and every year during her natural life—were held to create a separate use for her. The bequest was direct to the sister, no trustee being named. The rule laid down in *Lamb vs. Milnes*, 5 Ves. 520, that to deprive a husband of his right to participate in his wife's property it is necessary to show a clear intention to exclude the husband from any enjoyment of it, was adopted in *Evans vs. Knorr*, 4 Rawle, 72. The claim in that case was rejected as contrary to the intention of the testator, as it was for the same reason in *Torbet vs. Twining*, 1 Yeates, 432. It is always a question of intention; as in *Jamison vs. Brady*, where the legacy was for her *own* use, it was adjudged to be given for her separate use. For her *own* use, said Chief Justice Tilghman, is tantamount to saying not for the use of her husband, because if it was for his use it could not be for her own use. The language here employed indicates the intention to create a separate use more clearly than that used in *Jamison vs. Brady*, for here it is to be paid to her *only*, or to whomsoever she would clothe with authority to receive it; and if it was to be paid to her only, it excludes the idea of payment to her husband, or that he should exercise dominion over it.

It is not necessary to create a separate interest in a wife that a trustee should be interposed between her and her husband. Equity will, if it is requisite to support the intention, turn the husband into a trustee for the wife. 5 Barr, 287; Hill on Trustees, 4 Amer. edit. 654, 655. This general doctrine is very clearly stated by Judge Ludlow in the case of *Craige vs. Craige*, Leg. Int., December 6, 1872.

Sarah L. Keene appointed three executors of her will, of whom the accountant was one, and she is now the only survivor; but this does not, as we have seen, prevent the separate use vesting, nor is it material that the bequest is directly to the legatee. This was the case in *Tyson's Appeal*, and in many of the cases in which the trust of this character have been supported.

We sustain the trust as to Mrs. Mitchell for the following reasons :

1. It is an active trust for the life of Mrs. Mitchell.
2. It is necessary to hold the fund or securities for those who are contingently in remainder in several degrees.
3. There is, we think, a clear intention to create a separate use for Mrs. Mitchell ; the use having been established in expectation that she would marry, which is shown not only by first portion of the bequest, but by the subsequent reduction of the legacy from \$30,000 to \$10,000 if she married without the approval of the testatrix.

For the reasons given, we uphold the bequest to Mrs. Mitchell as a live trust. If there was nothing more than the performance of active duties by the executors, to invest and to keep invested the fund, to collect and pay over income to her, we think this trust cannot be overthrown, unless the cases of *Barnett's* and *Bacon's Appeals*, to which are to be added *Shankland's Appeal* and *Vaux vs. Park*, which preceded *Parker's Appeal*, and *Graham's Appeal* and *Barclay vs. Lewis*, which followed it, are to be considered as no longer law in Pennsylvania. We think we have shown the radical difference between the question under Mrs. Keene's will and that which arose under the will of John Brown Parker. *Parker's Appeal* is authority for just what is decided in that case, nothing beyond, and is to be considered as standing in parenthesis between *Bacon's Appeal* and the cases cited, which were decided before *Bacon's Appeal* and *Graham's Appeal*, and *Barclay* and *Lewis*, which followed it. We think that these cases rule the one before us, and that *Parker's Appeal* is not in point.

We are also of the opinion that a trust exists as to the legacy of \$10,000 to the nephew, Henry E. Keene, because the duties imposed are such as to constitute it an active trust. It was incumbent on the executors to invest in ground-rents and mortgages to pay the interest only to Henry for life ; the remainder is to his children absolutely. Henry is married and without children, but it is not certain that he will not have issue. It will hereafter become a question as what is to become of this legacy if he should not leave issue, there being an alternative remainder to brothers and sisters—the brothers are dead, but have left each a widow and children surviving them.

The surcharge of \$1257.22 was admitted to be a mistake on the part of the auditor. It had already been charged against the accountant in the surcharge of \$3811.57 gain on sales of State loan, and must therefore be stricken from the account.

Upon the question of the surcharge of \$7500, one-half the proceeds of land in Bradford county, and \$1000 the amount for which the accountant sold the Sunbury lot, there is a dispute as whether the question raised by the third exception to the report of the auditor, on the account of the executrix, was waived by the exceptants. This land was devised to Ellen Keene, her niece, and to her three nephews, James, Henry and Lenox Keene. James and Lenox died in the lifetime of the testatrix, and both left issue. Ellen and Henry, claiming that they were entitled to the whole of this land by right of survivorship, sold the Bradford county property for \$15,000. The auditor holds that the shares of James and Lenox lapsed and accrued to the residuary estate. If he is right in this conclusion, then it is clear that the conveyance of Ellen

and Henry to the purchasers passed only their interest in the same, leaving the remaining moiety still vested in the residuary legatees. This would leave the question of reimbursement to be settled between Ellen and Henry and their grantees.

The auditor says, that circuitry of action was wholly disclaimed by the grantors, and this, he adds, is equivalent to substituting proceeds of sale for the claim on the property. He does not directly say, that the grantors consented that he should pass on this question of surcharge, but it would appear that he understood them to consent to it, which they stoutly dispute. This question will have to go back to the auditor, for if the exceptants did not agree that he should bring this claim into the account it has no proper standing in it, and it may be a question, whether the Orphans' Court can, in any event, take jurisdiction of it, as the land was not sold under a testamentary power or by order of the court.

If we are right upon the question of the existence of a trust, there can be no claim by the remainder men to have the fund paid to them upon their giving security.

The exceptions to the report are sustained in accordance with the views above expressed, and it is referred back to the auditor for readjustment upon the principles above set forth.

Eli K. Price and Henry E. Keene, Esqs., for the exceptions.

B. H. Brewster and Geo. L. Crawford, Esqs., in support of the report.

[Leg. Int., Vol. 30, p. 432.]

ESTATE OF ELIZABETH BENTLEY, DECEASED.

After twenty years it is the presumption that an administrator's account is duly settled, and the burden of proof is on the complainant to overthrow this presumption.

Opinion delivered *December 20, 1873*, by

PAXSON, J.—This was a citation upon Ann Catharine Bentley and David B. Bentley, executors of the last will and testament of David Bentley, deceased, who was executor of Elizabeth Bentley, deceased, to show cause why they should not file in the proper office the account of David Bentley as executor of said Elizabeth Bentley.

The said Elizabeth Bentley died in the year 1836, and letters testamentary were granted upon her estate in the same year to the above-named David Bentley. The latter died in the year 1857, and letters testamentary upon his estate were granted to the above-named respondents. It was further alleged that no settlement or account of the estate of Elizabeth Bentley, deceased, had ever been filed by the said David Bentley in his lifetime, or by his executors since his death.

The respondents answer, alleging that the estate of said Elizabeth Bentley has been fully administered, and denying that they have any assets in their hands, as executors of David Bentley, belonging to the estate of Elizabeth Bentley. They further claim the benefit of the presumption of settlement raised by the lapse of time, and deny their liability to account.

Depositions were taken on the part of the petitioner to rebut this presumption. The testimony adduced, however, is of a vague and unsatisfactory character. It is open to the further and more serious objection that the admissions relied upon do not come down to a later

period than 1844. From that date to the present time no admission by the said David Bentley, nor by his executors since his death, has been proved of any assets unadministered in his hands belonging to the estate of Elizabeth Bentley, deceased.

Under these circumstances, are the respondents liable to account? The general rule in regard to presumptions is briefly stated in *Foulk vs. Brown*, 2 Watts, 209: "After a lapse of twenty years, all evidences of debt excepted out of the statute of limitations are presumed to be paid. Within the twenty years, the onus of proving payment lies on the defendant; after that time, it lies on the plaintiff to show the contrary." The liability of executors to account after twenty years was fully considered in the case of *William Brown's Estate*, 8 Phila. Rep. 197; the judgment in which case has since been affirmed by the Supreme Court. It was there held: "If an executor or administrator be cited to account more than twenty-one years from the grant of letters testamentary, or of administration, he may reply to the citation that twenty years having elapsed since he might have been called upon to account, the law presumes that he settled an account within one year, and distributed the estate among those entitled thereto. By the law of this State, an executor is entitled to one year to settle his account; during that period he cannot be cited unless for misconduct, and it would seem that the presumption would commence to run from the expiration of the year, or the time when he might have been called upon for an account. But it is only a presumption, liable to be rebutted by proof that in point of fact no account has been filed and no distribution made, and when overthrown by such evidence, the liability to account remains in full force. In this, it is unlike the statute of limitations, which interposes a flat bar to a recovery after the statutory period. The practical effect of the presumption is to shift the burden of proof."

After twenty years the presumption gathers strength with every succeeding year, and requires a corresponding increase in the weight of the evidence to overthrow it, until by lapse of time that which was originally a presumption of law and fact, liable to be rebutted, becomes a presumption of mere law, and is conclusive. For the time must come in every human transaction when litigation shall end, otherwise, there would be neither peace in this world for the living, nor safety for the estates of the dead. It is now thirty-six years since the executor of Elizabeth Bentley might have been called upon for an account. The Orphans' Court, in the exercise of its equity powers, ought not to be "swift to hear" the stale complaint of a litigant who has slept upon her rights for this long period, and who comes into court only when he who might have answered her allegations has been in his grave for sixteen years. His books and vouchers may be lost or destroyed; some of his witnesses may be dead, while the facts may have faded from the recollection of such of them as may be living. It would be a hardship to compel an account under such circumstances; it might do serious injustice.

The burden of proof to overthrow the presumption is on the complainant; she has not succeeded, and her petition must be dismissed.

S. N. Rich, Esq., for petitioner.

Thomas Greenbank, Esq., for respondent.

[Leg. Int., Vol. 31, p. 28.]

ESTATE OF JANE CAMPBELL, deceased.

An Orphans' Court auditor cannot take notice of an attachment of a legacy.

Exception to auditor's report. Opinion delivered *January 17, 1874*, by

PEIRCE, J.—This is an exception by an attaching creditor of one of the legatees of the estate. A judgment was recovered against James Britton and Catharine Britton his wife (the legatee), in an action by a sheriff's vendee for possession of premises occupied by them. Damages were assessed and an attachment was served on the accountant, with the object of making the legacy available for payment of the damages. The auditor declared the attachment of no effect, as thereby the separate property of a married woman would be made answerable for her husband's tortious holding of possession.

It does not matter whether the auditor was right or wrong in this decision. The judgment is not a claim against the decedent's estate and cannot be adjudicated in the Orphans' Court.

The rights of the attaching creditor must be determined in the attachment suit, not here.

The exception is dismissed and the report of the auditor is confirmed.

J. Cooke Longstreth, Esq., for the accountant.

H. W. Gimber, Esq., for exceptant.

[Leg. Int., Vol. 31, p. 53.]

SERGEANT'S ESTATE.

When income or interest is bequeathed it begins to run from the death of the testator, if the fund is productive and the estate free of debt.

Exceptions to auditor's report. Opinion delivered *February 7, 1874*, by

FINLETTER, J.—The testator bequeathed three-fifteenths of his personal estate to J. S. Gerhart, in trust, to pay the income thereof to his niece, M. S. Smith, for life, and on her death to transfer the principal to her surviving children. He left in interest-bearing stocks and bonds, etc., \$85,882. The auditor refused to award her interest for the first year.

It has been considered well settled by Bird's estate and the authorities therein cited, that when "income" or "interest" is bequeathed, it begins to run from the death of the testator, if the fund is productive and the estate free of debt. In those decisions this principle is derived from the nature of the bequest itself, and has no dependence upon the relationship or condition of the legatees.

The auditor, whilst admitting the principle, thus qualifies it: "The courts will look at the *intent* of the decedent, and the character and situation of the legatee, and the surrounding circumstances, and if the life-tenant is the immediate object of the tenderness and bounty of the testator, will lean in favor of interest from the time of testator's death."

In this he has wholly misunderstood the letter and spirit of all the authorities in this State. Without doubt, the *intent* of the testator,

whatever it may be, must be carried into effect. In cases such as this, the courts have said, that the intent is, that the income shall begin to accrue from the death of the testator. That the legatee is or is not "the immediate object of the tenderness and bounty of the testator," is not an element which enters into the decisions. The auditor has borrowed the idea from the cases in which legacies have been given to children payable at a future time or event.

The exception sustained.

Hon. *Peter McCall* for exceptants.

E. Spencer Miller, Esq., contra.

[Leg. Int., Vol. 31, p. 53.]

ESTATE OF SARAH SHAW, deceased.

A certiorari from the Supreme Court prevents this court from proceeding with an attachment.

Opinion delivered *February 7, 1874*, by

FINLETTER, J.—December 2, 1873.—The administrator was ordered to pay certain parties interested.

December 31, 1873.—Rule entered for an attachment for not complying with said order, which was made absolute.

January 3, 1874.—Afterwards an appeal was taken and certiorari issued from the Supreme Court, by and in the name of J. Alexander Simpson, security for the administrator. Subsequently an order was entered by his Honor, Judge Paxson, suspending the attachment until further order of court.

January 5, 1874.—Rule entered to show cause why the order suspending the attachment should not be vacated.

All the questions arising from the issuance of the writ of certiorari, the manner of entering security, and its sufficiency, must be remitted to the court from which the writ issued.

We are now asked to put in force an attachment which, after the record was removed, we had suspended. This is in effect asking us to issue an attachment to compel the administrator to comply with a decree of this court which has been removed from us for revision by a superior tribunal, or suffer imprisonment.

This we do not think we have the authority to do. An act of the court, put in operation, as an execution, before the removal of the record, may very well be allowed to spend its force, as the court can control its results. An attachment suspended is *functus officio* until another act of the court restores its vitality. How can we do this when the whole cause is removed from our jurisdiction? How could we redress the wrong done by imprisonment if our decree for payment should be reversed?

Even if this view be incorrect, or if we entertained a different one, we would not at this time enforce by attachment the order to pay, as it is admitted that the accountant has paid the money to his counsel and security, who has appealed from that order. The refusal or neglect to comply with the order does not appear to be corrupt or disrespectful.

Rule discharged.

Joseph M. Pile, Esq., for petitioner.

Wm. H. Ruddiman, Esq., contra.

[Leg. Int., Vol. 31, p. 53.]

YOUNG'S ESTATE.

Claimants are not competent as witnesses before auditors in distribution of intestate's estate.

Exceptions to auditor's report. Opinion delivered *February 7, 1874*, by FINLETTER, J.—The first, fourth, fifth, eighth, and nineteenth exceptions are to the charges of counsel. In all they amount to \$615. The auditor and the witnesses examined before him consider them moderate. From the kind and value of the estate, and the admitted sources, we think the allowance reasonable, and dismiss the exceptions.

The fifteenth exception is to commission allowed on \$2087.16, the value of yarn in the inventory. It is alleged that the yarn was subsequently manufactured into carpets, and a commission was allowed upon the price for which they were sold. This fact does not clearly appear, either from the report of the auditor, or from the argument of counsel. We therefore refer it to the auditor for re-examination. When commissions are allowed upon any of the component parts it should be deducted from the commission upon the aggregate.

The second, tenth, eleventh, and thirteenth exceptions are to the claims of Edward Steele and the accountant, which were allowed by the auditor. The claimants were examined as witnesses, and the auditor reports that upon the whole testimony he allowed the claims. This is a palpable violation of law, and wholly inexcusable. The auditor reports that they were not objected to as witnesses. This did not authorize him to receive their evidence. The law itself, and the wise policy of the law, interposed an insuperable objection, and it was the duty of the auditor to enforce it. There was also a corresponding duty upon the accountant and the counsel who represented the estate to intervene for the protection of the estate. It may be, when all the parties interested agree to the admission of such evidence, that it may be allowed. This agreement, however, should be in writing, and should appear upon the report. Less than this would subject the estates of the dead to spoliation.

We refer these exceptions to the auditor to take any further testimony that the parties may produce, and report the same to us, together with all proper testimony already taken.

The twelfth and sixteenth exceptions are sustained. All the other exceptions are dismissed.

The report is referred to the auditor to report in accordance with these views.

J. D. Bennett, Esq., for exceptions.

G. S. Graham and John Roberts, Esqs., contra.

[Leg. Int., Vol. 31, p. 76.]

ESTATE OF ISAAC R. SMITH, DECEASED.

A devise to "my daughter, E., and her children—their children taking her mother's share," gives to the daughter a life-estate only and not a fee.

Exceptions to auditor's report. Opinion delivered *February 28, 1874*, by

PEIRCE, J.—The question raised by the exceptions in this case is,

what estate does Mrs. Elizabeth R. Snowden take under the will of her father, the decedent?

The residuary clause under which she takes her interest is as follows, viz.: "I will and bequeath all the rest, residue, and remainder of my estate, of whatsoever kind and wheresoever situated, real, personal, or mixed, to be apportioned, divided equally, share and share alike, and equal to each, between my wife, Caroline E. Smith, my daughter, Elizabeth R. Snowden, and her children—the children taking their mother's share; my son, Walter B. Smith, my daughter, Mary B. Smith, and my daughter, Margaret R. Smith, each of them to receive an equal division or share."

The well-established rule for the interpretation of wills is to ascertain what was the intention of the testator. That ascertained gives the law of the case, when such intention does not conflict with certain general and qualifying rules limiting the extent of testamentary power, which considerations of public policy have established. *Earp's Will*, 1 Parsons, 457.

We have also the right in such inquiries to call to our aid the circumstances under which the will of the testator has been made, the state of his property, his family and the like. 2 Powell on Devises, 6.

The auditor accordingly has reported, that just before, and at the time of the making of the will, Mrs. Snowden was quite ill, and it is conceded on all sides, was in an unusually critical condition. The father had the most serious apprehensions as to her recovery, and feared, from his knowledge of her condition, that the slightest excitement might prove fatal.

From these facts, and from the further facts, that Elizabeth was married to a gentleman in whom the testator placed the highest confidence, and confided the most responsible trusts, and that he had put no limitation upon the estates given to his other daughters, one of whom was contemplating marriage, and the other would be likely to contemplate marriage in the future, the auditor has inferred that the intention of the testator was to give one absolute fifth part of the residuary estate, if she survived him; but in the event of Elizabeth's dying during his life, then her children would take their mother's share.

But suppose Elizabeth should die a day after the testator's death, instead of a day before, what then was the intention of the testator? One event was as possible as the other. It is scarcely a safe rule for the interpretation of a will to make the intention of the testator dependent upon a contingency which he has not named, and to give an opposite effect to the language of the will, as the contingency has or has not happened.

We are remitted by this consideration to ascertain what is the natural meaning of the language used by the testator, for that is supposed to be in a case like this what he intended respecting the disposition of his estate.

The word "*children*," when used in its ordinary sense, is a word of purchase, and not of limitation. Its meaning may be qualified by other parts of the will, and be shown to be used in the sense of heirs or issue to effect the intention of the testator, and when so used it is a word of limitation, but not otherwise. And so in like manner the words "*heirs*"

and "issue" may be shown to mean children, and to be words of purchase and not of limitation; *Smith vs. Folwell*, 1 Binney, 559; *Clark vs. Baker*, 3 S. & R. 475; *White vs. Williamson*, 2 Grant, 253; *Haldeman vs. Haldeman*, 4 Wright, 29.

The rule in Shelly's case does not apply to the word children in a devise. As one of the principal reasons for establishing this rule was to prevent an abeyance or suspension of the inheritance, it is only applied to limitations in which the word heirs is used, on account of the maxim that *nemo est haeres viventis*. So that if lands are limited to A for life, remainder to his first and other sons and the heirs of their bodies, or remainder to the child and children of A, or to the issue of A and the heirs of their bodies, no more than an estate for life will vest in A, and the words son, child or issue will be construed words of purchase: 3 Cruise's Digest, 380.

It was said by Eldon, Lord Chancellor, in *Crooke vs. De Vandes*, 9 Vesey, Jr., 205, "the safest course is to abide by the words; unless upon the whole will there is something amounting almost to demonstration, that the plain meaning of the words is not the meaning of the testator."

What then did the testator mean when he gave the one-fifth part of the remainder of his estate to his "daughter Elizabeth R. Snowden and her children—the children taking their mother's share?"

If the devise and bequest had been to "Elizabeth R. Snowden and her children" these words alone would have given her a life-estate, with remainder to her children (*White vs. Williamson*, 2 Grant, 253; *Coursey vs. Davis*, 10 Wright, 25), but when the testator superadds the words, "the children taking their mother's share," he plainly indicates that his daughter was to have an estate for life, which her children were to enjoy after her death.

This devise being to the children as a class, all the children of Mrs. Snowden will take, as well as those who may be born hereafter, as those who were living at the death of the testator. *Smith on Executory Interests*, sec. 227; *Cote vs. Von Bonhorst*, 5 Wright, 251.

The first, second and fourth exceptions of the guardian *ad litem* are sustained.

E. Coppee Mitchell, Esq., for exceptants.

The late Hon. *James Thompson*, for Mrs. Elizabeth R. Snowden.

[Leg. Int., Vol. 31, p. 116.]

ESTATE OF STEPHEN F. GORDON, DECEASED.

1. The court of the county in which a transcript of the record of a judgment from another county was entered cannot frame an issue to test the validity of the judgment. The court of the county in which it was originally entered has this power.
2. If the affidavit is sufficient the requirement for an issue becomes a matter of right.
3. The Orphans' Court has the power upon the settlement and distribution of the funds in the hands of an executor or administrator to frame an issue to determine the amount due on a judgment in another court.

In the matter of the petition of the administrators of the estate of Stephen F. Gordon, deceased, praying for an issue to determine the validity of a judgment. Opinion delivered April 4, 1874, by

ALLISON, P. J.—The administrator of Stephen F. Gordon's estate

applied to the Orphans' Court of Philadelphia for and obtained an order to raise \$10,000 for the payment of debts of decedent, by sale of land belonging to the estate in Bucks county. The Orphans' Court of that county made the necessary order of sale, which was executed by the administrator, and to which he made return, that he had sold the land to Alonzo Gordon, a judgment creditor of the decedent, for the sum of \$13,394. This judgment was entered in the District Court of this city, as of September term, 1869, No. 713, for \$10,000, and a transcript of the same was entered in the Common Pleas of Bucks county before the sale, and thereby became a lien on the land sold.

A dispute arose between the administrator and the judgment creditor, as to an allowance of a credit of said judgment, in part payment for the land, which resulted in an issue framed by the Orphans' Court of Bucks county, to try the question of the validity of the judgment, and if valid, how much was due upon it. When the case was called for trial, December term, 1873, the court struck off the issue for want of jurisdiction, and the petitioner is now before us asking that an issue be awarded by the Orphans' Court of Philadelphia, to try the questions, which it was originally proposed to try in the Common Pleas of Bucks county.

If there had been a doubt, as to whether a transcript of a judgment entered in a county other than that in which the original judgment was obtained, was itself a judgment, or a dependent emanation from one, it was swept away by *Brandt's Appeal*, 4 Harris, 343. A judgment of one county may be transferred to any other county by filing a certified copy of the entire record; the act of 1840 provides that it shall have as to lien, revival, execution and so forth, the same force and effect as if the judgment had been entered in the same court to which it may thus be transferred. Chief Justice Gibson in *Brandt's Appeal* remarks, it is not then a very judgment of that court, but a *quasi* judgment, and that, too, only for limited purposes. An exemplification of it as evidence of it elsewhere could be made only by that court, meaning the court in which it was first entered. *Brandt's Appeal* covers the whole ground, deciding, as it does, that the original judgment having been set aside for irregularity, the judgment on the transcript fell with it. It was doubtless upon the principle settled in this case, that the Orphans' Court of Bucks county declined to try the issue which it had first directed to be framed, involving as that issue did, an examination of the question of fraud in the procurement of the judgment, as well as the question of consideration, and what amount, if any, was due upon it. This, we think it is clear, can only be done in the county in which it was originally entered; as it had no other standing upon the records of the Court of Common Pleas of Bucks, except such as is prescribed by the act of 1840; and an inquiry, such as that contemplated by the issue, is not within the letter or the spirit of the act, which gives authority to enter the transcript upon the records of that court.

The application for an issue in this jurisdiction is based upon the act of April 20, 1846, P. L. 411, which treats of returns made by a sheriff, executor, administrator, or other person who has made sale of real estate, whereby it appears that the purchaser is a lien creditor, and has given his receipt to the officer for the amount of his lien. If the right of the

purchaser to the credit which he claimed is questioned or disputed by any person interested, the court shall thereupon appoint an auditor to make distribution of the proceeds of sale, or direct an issue to determine the validity of the lien. The second proviso to the second section exacts, that before an issue shall be directed, the applicant shall make affidavit, that there are material facts in dispute, and shall set forth the nature and character thereof, whereupon the court shall determine whether such an issue shall be granted. In construing this act of assembly, we held that an application could properly be made directly to the Orphans' Court, for an issue to try the validity of a judgment, entered in the District Court of Philadelphia, even though the question of distribution of proceeds of real estate, sold under an order of the Orphans' Court, was then pending before an auditor. *Bacon's Estate*, 2 Phila. Rep. 376. There is in this case no embarrassment arising from such appointment, we have before us a party who discloses by his affidavit, that he is interested, that there are material facts in dispute, and that he questions the judgment which the purchaser seeks to have applied in part payment of the land. He sets forth by particular statement, what the material facts are, which, if established by the verdict of a jury, would wholly set aside the judgment, and require that his claim of lien should be disregarded.

It is upon the affidavit that the question of issue or no issue is to be determined; the act says, "upon which affidavit the court shall determine whether such issue shall be granted." We put out of the case, therefore, the depositions taken upon a rule heard in the District Court, to show cause why the judgment should not be opened, which were submitted upon the argument of the question now before us.

It is said to be in the discretion of the court to grant or refuse an application for an issue, under the act of April 20, 1846; but if the requirements of this law are fully met, the issue becomes a matter of right; the discretion to be exercised is in determining the sufficiency of the affidavit. *Lippincott vs. Lippincott*, 1 Phila. Rep. 396. If it is general in its statements, and does not disclose the particulars of the proposed defence, or if, when set forth in detail, the facts would not, if established, be sufficient to overthrow the judgment in part or in whole, then it would be erroneous to grant an issue. *Baker's Appeal*, 59 State Rep. 313; *Russell vs. Read*, 27 State Rep. 166; *Cobb's Executors vs. Burns*, 61 State Rep. 278; *Christophers vs. Selden*, 28 State Rep. 165.

Knight's Appeal, 19 State Rep. 494, decides that a fact is properly said to be in dispute, when it is alleged by one party and denied by the other, and by both, with some show of reason. That case arose, however, under the 87th section of the act of June 16, 1836, relating to executions, which differs from the act of 1846, in this, that by the latter act the court must be controlled by the sufficiency of the affidavit of the petitioner.

That this is a judgment of another court of this county is not, we think, material; we, in effect, so ruled in *Bacon's Estate*, cited above; and in *Rowland's Estate*, 4 Clark's R. 199, Judge Sharswood, speaking for the District Court, holds, that a judgment may be impeached collaterally in another court than that in which it was rendered, for covin or collusion, even by a third party, and that such questions may be determined

in Pennsylvania, by the Orphans' Court, upon settlement of the accounts of an executor or administrator, in the distribution of the fund in his hands. This power was held in *Robinson vs. Zollinger*, 9 Watts, 169, to be inherent in the Orphans' Court, before the act of April 20, 1846, was in existence. The course to be pursued might differ somewhat from that prescribed by the latter act, but the general result would be the same. Without some such power that court could not perform its legitimate functions, for it alone has authority to ascertain the amount of a decedent's property, and order its distribution among those entitled to it. *Whitesides vs. Whitesides*, 8 Harris, 473, and *Kittera's Estate*, 5 Harris, 415. It has even the power to stay execution, issued out of another court, upon a judgment which binds land of a decedent, and require the creditor to come into the Orphans' Court to seek the payment of his claim.

The issue prayed for is granted.

E. K. Nichols and *J. S. Dubois*, Esqs., for petitioner.

W. C. Adams, Esq., for judgment creditor.

J. W. Patton, Esq., for Alonzo Gordon.

[Leg. Int., Vol. 31, p. 116.]

ESTATE OF WILLIAM PILING, DECEASED.

Advancement—receipt—references in prior auditor's report.

Exceptions to auditor's report. Opinion delivered April 7, 1874, by FINLETTER, J.—It is certain from the written acknowledgments of Elias Piling, that he received from the executors of decedent \$1500 prior to the year 1859.

When examined before the auditor he denied the receipt of the money, or any portion of it. In this he was mistaken beyond all peradventure.

If this sum were to be regarded simply as a loan from the executors it would be barred by the statute of limitations, as it has been in no way acknowledged since 1859. The reference to it by previous auditors did not preclude any one. It was not adjudicated by them as a matter in controversy, and was not therefore a "judgment of record."

A careful examination of the testimony, excluding that which is excepted to, satisfies us that this sum of \$1500, was advanced by the executors to Elias Piling, in part payment of his share of the estate of the decedent. If this be so the note must be regarded as a receipt and not as an acknowledgment of indebtedness; and the statute of limitations has no application.

The auditor was right in his distribution although he arrived at it in a different way. This view of the case makes it unnecessary to consider the exceptions to the admission of certain evidence.

The exceptions are dismissed and the report confirmed.

Charles S. Pancoast, Esq., for exceptants.

John K. Valentine, Esq., contra.

[Leg. Int., Vol. 31, p. 148.]

SHIVER'S ESTATE.

The words "leaving no issue," coupled with the words, "in case of the decease of either of them," would primarily be construed to mean not death at an indefinite time, but this rule may be made to bend before the intent of the testator.

Exceptions to auditor's report. Opinion delivered *May 4, 1874*, by

LUDLOW, J.—In addition to what has been said by the auditor in this case, we add the following. Under a well-settled rule of construction, it seems to us to be clear, that the real estate possessed by the testator passed to his daughter Amelia in fee tail, and as she died without issue, her brother James took a vested estate, which by his will passed to his widow.

We consider the fund in court arising from the sale of the real estate, as real estate, for although the land was sold, it never was in point of law converted into personalty.

The disposition of the personal property of testator under this will presents another question for our consideration. Unquestionably, the words "leaving no issue," coupled with the words "in case of the decease of either of them," would primarily be construed to mean not death at an indefinite time, but at a fixed and definite period, as at the death of the testator or of the life-tenant.

But even this rule, when most rigidly applied, is made to bend before an intent, and an examination of the text-books and authorities upon this subject will, we think, prove that the intent may be established by the existence of additional limitations which depend upon other contingencies than those implied by the words "in case of the decease of either of them," or "in case of death" and the like. *Smith on Ex. 838-9, 847; and Powell on Devises, chap. 27.*

Herein lies the difference between this case and *Umstead & Reiff's Appeal*, 10 P. F. S., p. 365, which at first reading does appear to rule this cause.

In *Umstead & Reiff's Appeal*, the general rule was applied because no words appeared in the will from which it could be inferred that a death without issue during the life of the tenant for life was not intended. Where the contrary appears to be the intent, the rule gives way.

In this instance, the testator intended his son James in a certain contingency, to be the ultimate object of his bounty, if his daughter died without issue, or if she had issue and they died in their minority.

In the case above cited, and the authorities cited in it, the alternative limitations over were to a class, and not to a specific individual. In addition to this, while no trust arose during the life of the widow, at her death a trust was created, the object of which seems to have been to secure the capital to answer the limitation over, in the event of the death of the daughter, or of her death without issue of lawful age, and this last provision seems especially to contemplate a falling in of the share to James, for he shall take if said issue die in their minority. On the whole case, we are of the opinion that the auditor was right

in the conclusions arrived at by him, and we therefore confirm his report.

Exceptions dismissed and report confirmed.

Samuel C. Perkins, Esq., for exceptant.

J. B. Townsend, Esq., contra.

[Leg. Int., Vol. 31, p. 196.]

ESTATE OF SAMUEL BENISON, DECEASED.

Testator directed his burial lot to be improved. He owned no lot, but had selected one: *Held*, the *cy-pres* doctrine required the executor to bury him in and improve the selected lot.

Exceptions to auditor's report. Opinion delivered *June 10, 1874*, by PEIRCE, J.—The decedent by his will directed as follows, viz.:

First. I direct that my body be interred in my lot in Mount Moriah Cemetery.

Then, after directing his executor to sell his personal estate and pay his just debts and funeral expenses, and expenses of settling his estate. Second. "I give and bequeath to my brother, Joseph Benison, the sum of five dollars. The balance remaining I desire the executor of this my last will and testament to apply to fencing and otherwise improving and adorning my burial lot in Mount Moriah Cemetery, where my body is to be interred."

The testator did not own a lot in Mount Moriah Cemetery, but had given directions about the selection of a lot there before his death, and two had been reserved by the cemetery company for his approval.

The brother, as next of kin of the decedent, claims the balance of the estate, on the ground that the direction for the improving and adorning the burial lot is void because there is no such lot to improve.

Independent of all directions of the will, it was the duty of the executor to bury the decedent, and there is a sufficient indication in the will of the intention of the decedent to be buried in Mount Moriah Cemetery. This, of course, involved the purchase of a lot or burial place. Applying the doctrine of *cy-pres* to this direction, we think it is the duty of the executors to select a lot in Mount Moriah Cemetery, in accordance with the known and expressed wish of the decedent, and to improve and adorn it according to the direction of the testator.

The first exception touching the presumption of death of the absent brother of the decedent is well taken, but as it does not affect the disposition of the estate, the exceptions are dismissed and the report of the auditor is confirmed.

George Junkin, Esq., for exceptant.

W. N. Ashman, Esq., contra.

[Leg. Int., Vol. 31, p. 204.]

ESTATE OF MARY E. HILL, DECEASED.

1. A demand for an issue before a jury need not be allowed by an auditor unless there are sufficient averments to establish the fact.
2. An attorney cannot be compelled to disclose statements made to him by his client.

Exceptions to auditor's report. Opinion delivered *June 20, 1874*, by PEIRCE, J.—The exceptions in this case are twenty in number, but those most pressed at the argument were the exceptions relating to a demand

for an issue to determine the amount of money, if any, in the house at the northeast corner of Tenth and Pine streets, at the time of the death of Mrs. Hill, and at the time of the taking possession thereof by the administrator, and the "amount of money, if any, coming into the hands of the administrator, or his agent or agents, belonging to said estate."

And the further exception, that the auditor erred in refusing to surcharge the accountant with the money alleged to have been on the person of the intestate or in the house, northeast corner of Tenth and Pine streets, at the time of her death, or when the administrator took possession of the property and effects upon the premises.

We do not perceive that the auditor erred with respect to any of these exceptions. The issues, as demanded, were of the most unsubstantial character. There was no averment in them of any single fact tending to show a liability of the accountant for any of the moneys referred to. They were mere adventures into the region of surmise, and if granted, would have left a jury to grope amidst detached and disjointed evidence, none of which tended to fasten any responsibility upon the accountant or his authorized agent, John O'Byrne, Esq., for the money which was alleged to have been upon the person of Mrs. Hill, or on the premises at the time of her death.

The same remarks are applicable to the exception that the accountant was not surcharged with the same money under the evidence taken by the auditor.

If it be conceded that Mrs. Hill had upon her person a large sum of money at the time of her death, there is not a particle of testimony that one dollar of it ever came into the possession of the accountant or Mr. O'Byrne, or any other agent of the accountant. Mr. O'Byrne, on cross-examination, denied having ever received directly or indirectly, or having ever seen any money of the intestate, except the three hundred and twenty dollars with which the accountant has charged himself. And no part of the testimony shows, or even tends to show, that any portion of the missing money ever came into his possession or the possession of the accountant, or any other person representing him or connected in any manner with the administration of the estate by him.

Five days elapsed after the murder of Mrs. Hill, before the house came into the possession of the accountant, or his attorney, Mr. O'Byrne. In the meanwhile, it had been in the possession of the officers of the law. Numerous persons had visited it. The house was twice searched, and a list of the articles of jewelry, money and papers which were found made out. The body of Mrs. Hill was searched. The cess-pool was examined, and also the ashes in the grate, but no money or traces of money were found, except the three hundred and twenty dollars with which the accountant has charged himself in the account.

It would be stretching the bounds of imagination to the utmost, if, after all this, in the absence of proof, the accountant could be supposed to be chargeable with the money which it is believed was in the possession of Mrs. Hill at the time of her death.

But we are asked to suppose this, because, after the house came into possession of the accountant and his agent, Mr. O'Byrne and Mr. Mann, the counsel for George S. Twitchell, a day or two before his trial,

went to the house, and went down the cellar, and almost directly to a hole where the lath and plaster had been knocked out at the end of one of the joists, and Mr. O'Byrne reaching up and putting his hand in drew out a slung shot, made of a piece of lead like a dipsey, with a strap fastened to it. They had gone there to search for a weapon. Nothing else was taken out of the hole or removed from the house at that visit, nor did it appear that anything else was in the hole to remove.

It is needless to say that the wildest conjecture could not create a responsibility for the missing money from that circumstance. I therefore dismiss it without further remark. Another exception was that the auditor erred in permitting Mr. O'Byrne to decline to state what became of the money, alleged to be fifteen or twenty thousand dollars, upon the person of the intestate, on the ground of professional confidence. The English rule on the subject of privileged or confidential communications from client to counsel is, that with respect to such communications the mouth of the witness is forever sealed, and he cannot reveal them at any time, or in any proceeding, although the client be no party to it, however improbable it may be under the circumstances, that any injury can result to him from the disclosure, and although the relation of attorney and client has ceased by the dismissal of the attorney. 2 Starkie on Evidence, 320.

The protection given by the law to such communications does not cease with the termination of the suit or other litigation or business in which they were made; nor is it affected by the parties ceasing to employ the attorney and retaining another; nor by any other change of relations between them; nor by the death of the client. The seal of the law once fixed upon them, remains forever, unless removed by the party himself in whose favor it was there placed. It is not removed without the client's consent, even though the interest of criminal justice may seem to require the production of the evidence. Greenleaf on Evidence, s. 243.

It is said in a Pennsylvania decision, that when the client's interests are not affected by the communication, the rule has no application, for the reasons of it do not exist. *Hamilton vs. Neel*, 7 Watts, 522.

But even with this modification of the rule, the communication of the client to counsel in this case, if made, as is implied by the exception, is too momentous to bring it within the exception stated. The single consideration that George S. Twitchell's estate, if he had left any, might be affected by the answer to this question is decisive of the matter, to say nothing of its effects as tending to further blacken his memory.

The exceptions are dismissed, and the report of the auditor is confirmed.

John J. Ridgway, Jr., Esq., for exceptions.

[Leg. Int., Vol. 31, p. 244.]

HENRY C. ORAM'S ESTATE.

An executor bought materials to enable him to complete unfinished contracts of his testator, used the materials for that purpose, received the money therefor, and put it into his own private business: *Held*, that the estate was not liable to pay the party who furnished the materials.

Sur exceptions to the report of James Starr, Esq., auditor.

The following is an extract from the auditor's report :

The claim represented by Mr. Arnold is that of L. B. Case, of Peconic, New York, for \$825 and interest from November 1, 1871, for goods sold and delivered to H. C. Oram & Co.

The auditor finds the following facts with regard to this claim. Henry C. Oram, the decedent, prior to and at the time of his death, was engaged in the business of manufacturing iron work and in the construction of iron buildings. He traded under the firm-name of H. C. Oram & Co., sometimes with a partner, but most of the time without one. During the last year of his life, he had no partner. His place of business was at Fifteenth and Hamilton streets, Philadelphia. His sons, Edgar W. Oram and Oscar C. Oram, were not partners with him in business, but were brought up and worked in his establishment. Henry C. Oram died on the 4th August, 1871, and soon after, viz., on the 1st of September, 1871, the sons, Edgar W. and Oscar C. Oram, formed a copartnership under the firm-name of H. C. Oram's Sons, doing business at No. 242 North Broad street, Philadelphia.

Henry C. Oram, previous to his decease, and in the name of H. C. Oram & Co., had contracted for the iron work for the building of the Presbyterian Board of Publication, on Sansom street below Broad. The decedent had also contracted in the same name on the 2d June, 1871, with F. A. Miller, for iron work on Guy's hotel, at Seventh and Chestnut streets; and at his death, the work on these two contracts was not completed. Edgar W. Oram, the son, and also one of the executors, completed these contracts; he received the money paid on them by the parties with whom they were made, and put it into and used it in the business of H. C. Oram's Sons, viz., his own business. The goods sold and delivered by L. R. Case, for the price of which this claim is made, were necessary to carry out and complete these contracts of the decedent; they were ordered by Edgar W. Oram, part (\$811.25) on 26th September, 1871, and a small part (\$13.75) on the 9th November, 1871. The orders were written on paper with a printed heading, "Office of the Philadelphia Iron Works, H. C. Oram & Co.," and they were signed "H. C. Oram & Co.," in the handwriting of Edgar W. Oram. There is no evidence as to whether Mr. Case knew of the death of Henry C. Oram at the time he received these orders; but the auditor finds that on the 9th November, 1871, Mr. Case at least knew of the change in the firm to H. C. Oram's Sons, and that about the 2d January, 1872, Mr. Case presented an account in which the charge for these goods is made to H. C. Oram's Sons.

The question in this claim submitted by counsel for decision is this, can an executor in order to complete a partially fulfilled contract of his

testator (no instructions being given in relation to said contract in the will), enter into new contracts as executor, and make the estate liable for such new contracts? In other words could the claimant, Mr. Case, sue the executor, as executor, for goods sold and delivered to him to carry out a contract between decedent and another party and recover from the estate?

The line between those executory contracts of a decedent which survive to his representatives, and those which do not, is not distinctly marked by the Pennsylvania decisions. But the distinction made in the books, that all such contracts survive, except those which require some special and personal quality or attention from the contractor, is definite enough for present purposes. Williams on Executors, sec. 1560-1; Addison on Contracts, sec. 1061-2. Under this classification, the auditor is of the opinion that these contracts made by the decedent with the Presbyterian Board of Publication and Mr. Miller survived to the decedent's representatives. That is to say, the Board of Publication and Mr. Miller would each have had a good cause for an action for damages against this estate if these contracts had not been completed. But it does not follow from this, that the executor is bound in law to proceed and finish the work on such a contract. This is a question which is necessarily left to his discretion. He alone can judge as to his capacity to complete the work and the risks attending the endeavor; otherwise, if bound to go on with the work, he might ruin the estate in an effort for which he was incompetent, and which it was folly for him to undertake. An executor finding an unfinished contract of his decedent on his hands may go on and complete it; and if he does, he can sue as an executor and recover the price; but if he does not elect to go on and finish, it is not he, but the estate, that is to respond in damages. But can the executor make the estate liable for new debts incurred by him to finish a contract?

It was held in *Corner vs. Shew*, 3 M. & W. 350, that a count alleging that defendant as executor was indebted to plaintiff for goods sold and delivered by the plaintiff to the defendant as executor at his request, or for work done and materials for the same, used and provided by the plaintiff for the defendant as executor at his request, and that the defendant as executor promised to pay, charges the defendant in his personal, and not in his representative character, and Williams on Executors, page *1609, in citing this case, says such a claim must necessarily be for debts due from the defendant in his own right, as no goods can be sold to or work performed for another in his representative capacity. The cause of action in this case was for work contracted for by decedent in his lifetime. In *Davis and French*, 2 Appleton, 21, it was held that an executor or administrator cannot create a debt against the decedent's estate, and it is immaterial how clearly the intent to do so may be expressed; for having no power to bind the estate he only binds himself by such a contract. Addison on Contracts, *1063. In *Woods vs. Ridley*, 27 Miss. 148, it was held that an executor is individually responsible, though he expressly promises to pay as executor, where the nature of the engagement necessarily creates individual liability; where, for example, he makes a promissory note or other written contract, where it does not clearly appear that it was given

or made for a debt or liability of testator. It was also held in that case, that a creditor who loaned or advanced money to an administrator might acquire an equitable claim therefor against the estate, if he could show that his money had in fact been applied to pay the debts of the estate, and would be subrogated to the rights of the administrator. It might well be argued from this that Mr. Case would have a claim against this estate if the estate had reaped the benefit of these two contracts, which, as has been found, it in fact did not do. But the auditor wishes to decide this case on the general principle of the right of an executor to create a debt against an estate; and if the estate is liable, Mr. Case ought not to suffer by the misapplication of funds of the estate by the executor.

In *Sumner vs. Williams*, 8 Mass. 199, it was held that "the general principle undoubtedly is, that an administrator has no power of charging the effects in his hands by any contract originating with himself; and it seems to be clearly understood by the decisions, that his contracts in the course of his administration, or for debts of the intestate, render him liable *de bonis propriis*." In *Seip vs. Drach*, 2 Harris, page 352, it was held as follows: "Nothing is better settled than that an executor or administrator is answerable in his official character for no cause of action that was not created by the act of the decedent himself. In actions against the personal representatives on his own contracts and engagements, though made for the benefit of the estate, the judgment is *de bonis propriis*; and he is, by every principle of legal analogy, to answer it with his personal property." The rule of liability thus established is a very salutary one. It is much more reasonable that an executor, in creating a debt against his decedent, should do so at his own risk, than that the power should be left in his hands to bind the estate with a new indebtedness. The wisdom of the rule is shown by the facts of this very claim now under consideration; and the holding of an executor to a personal responsibility will make him much more careful of the assets of the estate, from which he is to be refunded for the outlay he has made. The auditor is of opinion that this claim cannot be sustained. He does not liken the case to that of an executor who carries on the trade of the decedent, where all the profits go to the estate, and all the losses must be borne by the executor personally; but the case is analogous to that of an executor who buys materials for the purpose of making available for sale the assets of his testator, where there can be no question as to who must pay for the goods purchased.

The claim of Mr. Case is therefore disallowed.

To this report Mr. Case filed exceptions, which were argued on March 3, 1874.

Michael Arnold, Esq., for the exceptions, conceded that the general rule of law is opposed to his claim; but contended that the circumstances under which the claim arose made it so meritorious as to entitle it to be allowed as an exception to the general rule. Mr. Case did not know of the death of H. C. Oram when he supplied the goods to his executor upon an order signed H. C. Oram & Co. The auditor has properly held that the contracts of Mr. Oram with the Presbyterian Board and Mr. Miller survived; and that the estate would have been

liable to those persons had the executors declined to complete the contracts. The executors are at liberty to carry out the contracts of their testator, or abandon them and expose the estate to claims for damages, or allowance for as much as is not done by the testator, or themselves for him. *Dougherty vs. Stephenson*, 8 Harris, 210. If they have authority of law to complete the contracts, they have authority to buy materials, and if they can buy, then they can incur debts which the estate should pay. If, besides this, one of the executors receives the money, it is then in the estate, and his subsequent devastavit should prejudice the estate, not those who supply materials which enable it to escape claims for damages. Formerly, executors could make no contracts binding upon the estate. But exceptions were made, as in the case of the expenses of a funeral suitable to the degree of the decedent, when the executors would be held upon an implied contract. *Tugwell vs. Heyman*, 3 Campbell, 298; *Lucy vs. Walrond*, 3 Bing. N. C. 841; *Rogers vs. Price*, 3 Young & Jerv. 28; *McGlinsey's Appeal*, 14 S. & R. 64. Family mourning may be bought by them, and credit allowed in their accounts. *Wood's Estate*, 1 Ashmead, 314. The reason seems to be founded upon necessity. If the obligation be incurred to meet the needs of the estate, if the goods purchased be necessary, then the liability to pay springs up. The cases in the books which follow the general rule are cases where the executor used his official position to aid his private business, to get credit which he could not get on his personal account. In *Steel vs. McDowell*, 9 S. & M. (Miss.) 103, the rule is stated to be "that an action against an executor, upon a promise made by him as such, when the debt is created after the testator's death, can only be maintained when it affirmatively appears there was a clear and just liability on the part of the estate." Here the estate was saved from a liability for damages on unfulfilled contracts, and it ought to pay for the goods which enabled it to escape that liability. *Corner vs. Shew*, cited by the auditor, simply decides a rule of pleading, that when work is contracted for by a testator who dies before the contract is completed, it seems that in an action against the executor, the facts should be specially pleaded. In *Woods vs. Ridley*, its administrator used his official title on notes given in his private business. None of the cases in the reports are like this; none possess as much equity.

Joseph B. Townsend, Esq., in support of the auditor's decision, cited and relied upon *Seip vs. Drach*, 2 Harris, 352, and contended that executors can make no contract which will bind the estate in their hands. Funeral expenses, he said, are now allowed by statute, the act of February 24, 1834, sec. 21.

The court (ALLISON, President, and FINLETTER, Associate) dismissed the exceptions and confirmed the report of the auditor.

Register's Court, Philadelphia.

[Leg. Int., Vol. 30, p. 100.]

IN THE MATTER OF THE WILL OF FRANCIS SMITH, DECEASED.

The probate of a written republication of a will must be the same as the proof required to establish the will.

Appeal from the decree of the register of wills admitting the will to probate. Opinion delivered *March 22, 1873*, by

PEIRCE, J.—This case comes up on two grounds:—1st. For an issue to test the validity of the will; and 2d, upon the insufficiency of the probate made before the register.

The decedent made his will the 26th of August, 1864, and signed his name to it. He made a codicil to it dated 17th April, 1868, and made his mark to it. Republication of it was subsequently made in the following words:

"I, Francis Smith, have this twenty-first day of June, 1870, had the above will and codicil read to me, and I do hereby republish the same, and being blind and unable to see, I have directed and authorized Edward Olmsted to sign to this republication my name.

"FRANCIS SMITH,
"By Edward Olmsted, at his request."

Signed in our presence by Edward Olmsted, for Francis Smith, he being incapable from blindness to sign his name, and so signed at the request and by the direction of the said Francis Smith.

JOHN HORN, JR.
BENJ. F. LEVY.

The witnesses to the republication of the will and codicil, upon their oath and affirmation say, that they were present and did see and hear Francis Smith, deceased, the testator therein named, republish and declare the same as and for his last will and codicil thereto, and that at the doing thereof he was of sound disposing mind, memory and understanding, to the best of their knowledge and belief.

Was this a sufficient proof of a republication made under the peculiar circumstances and with the formalities of this republication?

The act of 1833 directs that every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall be of no effect.

That there may be a parol republication of a will since the act of 1833, was decided in *Campbell vs. Jamison*, 6 Barr, 498. The proof made before the register in this case goes no further than the proof of a parol republication. But the republication having been reduced to writing, by direction of the testator, as is alleged, and executed in the peculiar manner provided by the act, when signed by another for him, we think

should be proved as such testamentary dispositions are required to be proved.

It is essential to the probate of a will to which the alleged testator did not sign his name, that it should be proved by two witnesses that he was so infirm by reason of his last sickness, as to be unable to write his name, and that it was signed for him by some person in his presence, and by his express direction. *Greenough vs. Greenough*, 1 Jones, 489; *Asay vs. Hoover*, 5 Barr, 21; *Cavett's Appeal*, 8 W. & S. 21; *Ruoff's Appeal*, 2 Casey, 219.

It was said at the argument of this case that the will and codicil were proved independently of the proof of this republication, and that, therefore, it was not necessary to make proof of the republication. But republication may be an important part of a testamentary disposition; and therefore, where republication of a will has been made, and especially when made in writing and annexed to the will, it forms a part of the instrument. A will is said to be ambulatory until the death of the testator; that is, it is subject to alteration, revocation, republication, and to incidents independent of any direct acts of the testator on it himself; such as marriage, birth of children, death of beneficiaries, etc.

Thus, before the act of 1833, republication of a will carried with it the after acquired real estate of a testator. A republication of a will which forgives debts due from children discharges a bond taken between the making of the will and its republication. *Hutchinson's Appeal*, 11 Wright, 84.

A codicil duly executed revives and republishes the will to which it refers, unless there is an expressed intent to the contrary; and this, although there was a second will between the first will and the codicil thereto; and although the codicil to the first will contained no words of republication of the first will, or of revocation of the second will. *Neff's Appeal*, 12 Wright, 501.

A will speaks for certain purposes from its date and from the date of every republication of it. And in a case such as this, where the mental capacity of the testator to make a will is brought in question, the state of the testator's mind at the time of republication may be a question of the most vital importance.

Therefore, as probate of this republication has not been made in the manner required by law, it must be sent back to the register to take further proof of it.

It would not be proper to consider at this time the other question of the mental capacity of the alleged testator to make a will, as the further proof to be taken by the register may give a new direction to the proceeding; or may otherwise have a bearing on the questions involved in the case.

The appeal is sustained and the instrument of writing purporting to be the last will and codicil of the decedent, and the republication thereof, is remitted to the register of wills with instructions to take further proof of said alleged republication as is herein indicated.

Hon. F. Carroll Brewster, William N. Ashman, and F. C. Brewster, Jr., Esqs., for appellants.

Geo. W. Biddle and Geo. Biddle, Esqs., for appellees.

Circuit Court of United States.

Eastern District of Pennsylvania.—In Admiralty.

[Leg. Int., Vol. 29, p. 116.]

STORAGE CO. vs. THE BARQUE THOMAS.

A libel in admiralty will not lie for wharfrage as a maritime lien; the remedy in the common law courts is adequate.

Appeal from the District Court. Opinion delivered *April 1, 1872*, by McKENNAN, C. J.—In *Jones vs. The Coal Barges*, 3 Wall., Jr., 56, Mr. Justice Grier, with characteristic sententiousness, said, "A court of admiralty is not needed to try common law actions of trespass, nor to administer common law remedies in any form." And so it may be said here, that the admiralty jurisdiction is not to be invoked to enforce common law rights, for which the common law has provided appropriate and efficacious remedies.

The libellants are wharfingers at Philadelphia, and presented their libel *in rem*. to the District Court, to enforce the payment of wharfrage as a maritime lien upon the respondent's vessel. There is no authoritative adjudication that a claim of this sort stands upon such a footing. Certainly it has not been so decided by the Supreme Court. The weight of judicial opinion is the other way. It has generally been treated only as a common law lien, to be enforced by the detention of the vessel by the wharfinger, or to be recognized and paid as such out of the proceeds of the sale of the vessel, which had been brought under the control of the court otherwise than by an original libel, founded on the dockage demand. This is the import of the opinion of Judge Peters in *The New Jersey*, 1 Pet. Adv. 223, and of Mr. Justice Johnson, in the *St. Iago de Cuba*, 9 Wheat. 418, and I do not regard the opinion of Judge Story in *Ex parte Lewis*, 2 Gall. 483, as determining a different rule. Until the Supreme Court shall decide otherwise, I see no reason for expanding the admiralty cognizance of a demand, which rests securely upon a basis of common law right, and for the enforcement of which by the wharfinger himself the common law supplies an effectual remedy.

The disallowance of the libel by the District Court is therefore affirmed.

Henry Hazlehurst and J. Warren Coulston, Esqs., for libellants.

[Leg. Int., Vol. 29, p. 116.]

GEORGE DOLL vs. GEORGE C. EVANS AND JOHN LAMON.

1. An assessor of internal revenue has power to reassess the income tax of a citizen who has already paid the tax first assessed against him.
2. The imposition of an addition of one hundred per centum as a penalty for the return of a false or fraudulent valuation is constitutional.

Demurrer to plea. Opinion delivered *April 1, 1872*, by McKENNAN, C. J.—This demurrer presents only two questions, which it is necessary to consider: 1. Has an assessor of internal revenue power to reassess the income tax of a citizen, who has paid the tax first assessed against him? and, 2d. Is the act of Congress, which imposes

an addition of one hundred per centum to the tax, as a penalty for the "return of a false or fraudulent list or valuation," constitutional?

The defendants' plea avers, that the plaintiff made a return of his income for the year 1868 to the assessor of the third collection district of Pennsylvania, that he was thereupon assessed with an income tax of \$95.60, which was placed by the assessor on the annual list, that this list was delivered to the collector, to whom the plaintiff paid the tax so charged against him, that afterwards and within fifteen months after the delivery of said list to the collector, to wit, on the 21st of October, 1869, the assessor duly summoned and required the plaintiff to appear before him at his office in Philadelphia, on the 25th October, 1869, to produce all books of accounts, containing entries of profits from business, rents, etc., relating to his income and business from January 1, 1868, to December 31, 1868, which he had in his power, custody or care, and to give evidence according to his knowledge respecting his liability to an excise or tax, under the internal revenue laws, that the plaintiff did not appear in pursuance of said notice, whereupon the assessor proceeded to make, according to the best information he could obtain, and to his own view and information, a list or return of the income, gains and profits of the plaintiff for the year 1868, and did assess thereupon and charge to the plaintiff the sum of \$482.64, in addition to the \$95.60 before assessed, as his income tax, and did further add thereto the sum of \$482.84, being one hundred per centum, as and for a penalty for having made the false and fraudulent list, statement or return as aforesaid; that afterwards, to wit, on the 20th day of April, 1870, the said assessor certified and delivered to the defendant, George C. Evans, as collector, a certain list called the monthly list for the month of March, 1870, on which was charged to the plaintiff the sum of \$965.68, being the additional amount of his income tax for the year 1868, so reassessed and the penalty aforesaid, that the said collector duly notified the plaintiff of the said charge, and demanded payment thereof on or before the last day of April, 1870, that the plaintiff did not pay the same, and that the defendants afterwards, on the 9th day of May, 1870, proceeded to collect the same by distraint of the goods and chattels mentioned in the declaration.

The demurrer admits the truth of these facts, and the sufficiency of the plea, therefore, depends upon the legal authority of the assessor to reassess the plaintiff's income tax, and to add one hundred per centum thereto. If the law conferred this power upon the assessor, the list made out, certified and delivered by him to the collector was a sufficient warrant to the latter to demand and collect the tax charged therein, and constituted a complete justification of the seizure of the plaintiff's goods. The collector is responsible only for the possession of authority by the assessor to make the reassessment, not for his conformity to directory provisions of the law, as to the mode of its exercise.

This question is to be solved by the construction of the internal revenue act of June 30, 1864. The 20th section of that act authorizes an additional or reassessment of income tax, within fifteen months after the delivery of the annual list to the collector, in all cases in which it is incomplete or imperfect, in consequence of any omission, understatement, undervaluation, or false or fraudulent return, made by any person liable

to said tax. The terms of this section are certainly broad enough to embrace the case stated in the plea, but it is urged that it was not intended to apply to the case of persons who have paid the amount of the original assessment.

The only limitation of the power of the assessor relates to the period within which it is to be exercised, and the cases to which it is to be applied. Within the prescribed period and in the specified cases, it is co-extensive with the power vested in him in reference to the original assessment. The object of the law is to confer upon him ample corrective cognizance of all omissions, understatements, undervaluations, falsehood or fraud in income returns, upon which the tax has been assessed and charged in the collector's list within fifteen months, to the end that every tax-payer may be subjected to his proper proportion of a public burden. To make the payment of less than this effective as a discharge from liability for a further sum, which ought rightfully to have been paid, and which has been avoided by the fraudulent act of the person subject to taxation, would be to circumscribe the scope of the law against its obvious intent. An express restriction alone could have this effect, and that is not to be found in the act.

But it is evident from the tenor of the act, that it contemplates the exercise of the power of reassessment after the payment of the tax first assessed. It is made the duty of the assessor to require a return of income on or before a fixed day in each year, and to make out, certify and deliver to the collector a list of the taxes charged therein. This is called the annual list, and after its delivery to the collector, it is, in nowise, subject to the control of the assessor. It is then the duty of the collector to proceed at once to the collection of the tax charged in this list, and to enforce prompt payment of it. The whole process of assessment and collection is intended to be completed within the year in which the assessment is made. Now, at any time within fifteen months after the annual list is delivered to the collector a reassessment may be made, and only the additional tax thus ascertained is to be charged and put in another list, called the monthly list. By this extension of the period for reassessment beyond the time when the original tax must be paid, and the provision for the collection of the additional tax only upon the monthly list, it is apparent that the assessor's power of reassessment is to be exercised independently of the fact of the payment or non-payment of the tax charged in the annual list.

It follows, therefore, that the additional tax assessed upon the plaintiff was authorized by the act of Congress, and the return made by him having been found to be false, it was the imperative duty of the assessor to add one hundred per centum, as directed by the 14th section of the act.

The remaining cause of demurrer is, that the act of Congress, in so far as it imposes a penalty for a false or fraudulent return, is unconstitutional. The act does not invest the assessor with power to "sentence" anybody; it does not even allow him any discretion as to the penal increase of the tax. It authorizes him to inquire whether the return is false or fraudulent, and if he so finds, requires him to add one hundred per centum to the tax. This is not conferring judicial power upon him, within the meaning of the constitution. It is simply empowering him

to ascertain a fact, according to which he is to adjust the amount of the tax imposed by law. That this function is judicial in its nature there is no doubt, but so are many like functions committed to public officers, as essential to the performance of their official duties. They are within the competency of Congress to confer, as necessarily incident to the execution of its expressly granted powers.

The acts of Congress furnish many examples of this. They are to be found especially in the laws relating to the collection of customs; and the validity of such legislation has never been denied. A single illustration will show this. By act of Congress collectors of customs are authorized to assess an additional duty of twenty per cent. upon goods valued by the appraisers at ten per cent. or more in excess of the value declared by the importer in the invoice and entry. The validity of an appraisement made and an additional duty imposed under this act, was before the Supreme Court in *Bartlett vs. Kane*, 16 How. 269. Judge Campbell, delivering the opinion of the court, said: "The plaintiff contends that the rule of appraisement by which the dutiable value of the goods was raised and the importer was subjected to the additional duty prescribed by the 8th section of the act of 1846, was illegal and void, and the duties thus claimed and paid under said appraisement were illegally exacted. . . ." The appraisers are appointed "with powers, by all reasonable ways and means, to ascertain, estimate and appraise the true market value and wholesale price of the importation. The exercise of these powers involves knowledge, judgment, and discretion." And again: "An examination of the several laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. . . . They are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud and injustice." And the legality of the appraisement and of the imposition of the penal duty was sustained. That the powers thus exercised by the appraisers are judicial in their nature is beyond question, for so the court distinctly treats them. They decided the fact that the importer's invoice was false, and thereupon the collector imposed upon him a penal duty of twenty per cent. And yet the court upheld the exercise of these powers by the appraisers and collectors, without intimating a doubt of the validity of the law conferring them. Their conclusion is a most expressive affirmation of the validity of such legislation. So also, in the present case, the investiture of the assessor with analogous functions must be sustained, as auxiliary to the execution of the same constitutional grant of power to Congress.

Judgment upon the demurrer will, therefore, be entered for the defendants.

Nathan H. Sharpless, Esq., for plaintiff.

Aubrey H. Smith, Esq., U. S. District Attorney, for defendants.

[Leg. Int., Vol. 29, p. 124.]

REEVES vs. KEYSTONE BRIDGE CO., J. H. LINVILLE, AND OTHERS.

1. Illustrative drawings of conceived ideas do not constitute an invention, and unless followed up by a seasonable observance of the requirements of the patent laws, they can have no effect upon a subsequently granted patent to another.
2. The patent of Reeves, June 17, 1862, for improved columns, braces, shafts, etc., is valid.

In equity. Opinion delivered *April 1, 1872*, by

MCKENNAN, C. J.—The respondents do not deny the making and use of the column described in complainant's patent. They deny that he was the first and original inventor of the invention claimed by him, and allege that his patent is invalid. This allegation rests upon the following specifications:

1. That the invention was originally made by Jacob H. Linville and John L. Piper.

2. That it was described in the *Allgemeine Bauzeitung* for September, 1861.

3. That it was illustrated by a drawing in the *Dreyfuss Album*, bearing the imprint of 1861.

To test the defensive sufficiency of this allegation, the nature and peculiarities of the invention must first be exactly understood.

They are stated in general terms in the patent. The patent is dated June 17, 1862, and is for an improvement in the construction of columns, shafts, braces, etc. The invention is thus described: "I use three or more wrought iron bars, similar to those marked *a, a, a, a*, in the annexed drawing, to which reference is hereby made, of such shapes and dimensions, so that when arranged together in the direction of their length, and fastened by rivets or bolts *c*, through their flanges *b*, they shall form a hollow shaft or column." And the patentee claims: "The uniting together three or more pieces of wrought iron, made with flanges, in the direction of their length, so that they shall form a column or shaft, to be used as posts, and also as braces or compressive chords in the construction of buildings, bridges, piers or other structures."

The peculiar features of this column are, that it is composed of not less than three longitudinal segments or bars of wrought iron; that the edges are flanged throughout their whole length; that when they are brought together the flanges are brought face to face; and the unity of the column is secured by bolts or rivets passing through these flanges, at short intervals.

Its distinguishing advantages are, that by using three or more pieces, each can be more easily and cheaply rolled; that by increasing the number of pieces, a post of any diameter, and any reasonable length, and of varying thickness of metal, can be made in an ordinary rolling-mill as readily and cheaply by the pound as posts of small diameter; that they can be handled by workmen and put together with greater facility and with the ordinary mechanical appliances; that the material embodied in it is concentrated in its periphery, thereby increasing its diameter, and consequently its strength; and that the flanges serve as buttresses, practically extending its diameter and giving it additional strength and power of resistance.

A hollow wrought-iron column does not constitute the patentee's invention, but it consists in a hollow shaft, so made as the result of a concentration in its periphery of the metal used in its construction, composed of at least three longitudinal segments of rolled iron, with flanges throughout their whole length, which are to be brought face to face, and through which they are to be fastened by bolts or rivets. This whole organization makes up the distinctiveness of the column, and is necessary to secure the advantages in manufacture and efficiency, which are claimed to belong peculiarly to it.

Under the proofs in this case, and aside from the specific objections hereafter to be noticed, it is hardly disputable that such a post is both novel and useful. Its utility is not contested, but its novelty is denied upon the several grounds before stated, which are now to be considered:

1. The invention is claimed by Linville and Piper, two of the respondents. On the 14th of January, 1862, a patent was granted to J. H. Linville for an improvement in iron truss bridges, which is described as partly consisting in a "novel construction of the posts of wrought and cast-iron." This post is composed of two rolled plates of wrought-iron, semi-octagonal in form, secured by rivets passing through the whole length of its diameter, or by bands shrunk around it, binding the plates firmly to distance pieces interposed between them at suitable distances to spring them apart at the middle and terminating in cast-iron bases and capitals. In the second claim of his specification, the patentee, therefore, very properly described his post as "composed of two wrought-iron plates or bars, a, a, distance pieces b, b, and rivets J, J, or their equivalents, and cast-iron bases L, L, and capitals O, O, the whole combined as herein specified."

It must be observed that the specification does not indicate the form of the post, as an appropriated or distinctive feature of the invention. The shaft is composed of two rolled iron bars, but that it must be hollow is an inference merely from the description. In comparing the invention with others, it must be considered as the product only of the elements which the patentee has indicated as necessary to give it its distinctive character. While, therefore, it may be constructed upon the principle of expanding the metal from the centre towards the periphery, yet the special mode in which this principle is embodied in it, and is made practically available, constitutes its patented peculiarity.

Treating it then as the patentee himself does, not as a technical combination, but an organized unit, composed of the enumerated constituents, I think it is essentially distinguishable from the complainant's post. They are alike only in this, that neither is solid, and both are made of rolled iron plates. In every other material point they are unlike. This dissimilarity consists, first, in the number of pieces of which the column is composed; second, in the use or absence of flanges to these pieces; third, in the mode of uniting or fastening the several pieces of the columns together; and fourth, in keeping the pieces in a straight line, and therefore parallel to each other, or forming them into curves by swelling the post in the middle. That these differences are essential, is apparent from Mr. Linville's specification, in which he described plates without flanges, their number, the mode of fastening

them together, and their being sprung apart at the middle, as component, and, therefore, material constituents of his organized post.

But it is unnecessary to enlarge upon this. Any other hypothesis is inconsistent with the patentee's acts. His patent imports that he was the sole inventor of the post therein described. But in 1865, in conjunction with Mr. Piper, he applied for and obtained a patent nominally for improvements in his post of 1862, but really changing its fundamental organization and seeking to fix its invention in 1860, and in fact describing and appropriating the distinctive features of Reeves' post, which had been patented three years before. Not only does this show that the post in question was not an improvement of which the post of 1862 was the basis, and that the patent of that year was not regarded as expansive enough to embrace it, but it is in fact and in law, an impressive disclaimer of his right to make an exclusive appropriation of it.

It is vigorously urged that although the patent of 1865 to Linville and Piper is subsequent in date to Reeves, the post described in it was invented in 1860, and that they, therefore, anticipated him. It is in evidence by several witnesses, that in 1860 Linville and Piper were engaged together in getting up plans for a proposed railroad bridge over the Schuylkill near the arsenal, at Philadelphia, that sketches of various forms of posts were made, among them those described in the patents of 1862 and 1865, that all the forms thus delineated were rejected, except the one described in the patent of 1862, which was adopted for the construction of the posts in that bridge, that the sketches of the post described in the patent of 1865 were preserved for a time but were lost, that no post of that description was made by the patentees until after the date of that patent, and in fact, that nothing beyond the making of the sketches was done to embody or carry out the alleged invention until the patent was applied for.

Will these sketches carry back the date of invention to the time when they were made, and thus give the patentees priority over the complainant or invalidate Reeves' patent? There is no doubt that Reeves was an original inventor of the post claimed by him. It was the product of his own reflections and mechanical knowledge. He is presumed to be the first inventor of the thing patented by him, and this presumption is in nowise impaired by the subsequent grant of a patent to another for the same thing. The effect of the sketches referred to, upon his rights, must therefore be determined without reference to the patent of Linville and Piper.

A patentee whose patent is assailed upon the ground of want of novelty, may show, by sketches and drawings, the date of his inceptive invention, and if he has exercised reasonable diligence in "perfecting and adapting" it and in applying for his patent, its protection will be carried back to such date. And in a race of diligence between rival inventors, the one who first perfects an invention and embodies it in a distinct form is entitled to priority. But can this be accorded to one who has conceived the idea of an invention, and has sketched it on paper, but has done nothing more in reference to it for a period of five years, as against the patent of an independent though subsequent inventor? Reasonable diligence in "perfecting and adapting" the invention is

essential to the efficacy of such a claim. This is the express condition prescribed by the 15th section of the patent act of 1836, as held by Mr. Justice Story, in *Reed vs. Culler*, 1 Story R. 590. Independent of this provision, he is entitled to priority of right to a patent, who first reduces his invention to a fixed, positive form, adapted to practical use. Unless, therefore, the speculations of Linville and Piper in 1860 had attained the perfection of a completed and patentable invention, their inaction until 1865 would clearly deprive them of the benefit of the 15th section.

Can an invention be considered as "perfected and adapted," which has reached only the maturity of an illustration on paper? In *White vs. Allen*, 2 Fisher, 446, Judge Clifford says: "Original and first inventors are entitled to the benefit of their inventions if they reduce them to practice, and seasonably comply with the requirements of the patent laws in procuring letters patent for the protection of their exclusive rights. While the suggested improvement, however, rests merely in the mind of the originator of the idea, the invention is not completed within the meaning of the patent laws; nor are crude and imperfect experiments sufficient to confer a right to a patent; but in order to constitute an invention in the sense in which that word is employed in the patent act, the party alleged to have produced it must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form. *Gayler vs. Wilder*, 10 How. 498; *Parkhurst vs. Kinsman*, 1 Blatch. 494; Curtis on Patents, sec. 43. Mere discovery of an improvement does not constitute it the subject-matter of a patent, although the idea which it involves may be new; but the new set of ideas in order to become patentable must be embodied into working machinery, and adapted to practical use. *Sickles vs. Borden*, 3 Blatch. 535." And in *Ellithorpe vs. Robertson*, Law's Dig. 428, sec. 48, Judge Ingersoll said: "The making of drawings of conceived ideas is not such an embodiment of such conceived ideas into practical and useful form, as will defeat a patent which has been granted." Equally strong is the language of Mr. Justice Nelson in *Winans vs. Harlem R. R. Co.*, Franklin Journal, 8 ser., vol. 61, 322, where he says: "The circumstances that a person has had an idea of an improvement in his head or has sketched it on paper, has drawn it, and then gives it up, neglects it, does not, in judgment of law, constitute or have the effect to constitute him a first and original inventor." Numerous other cases affirm the same doctrine; and it must, therefore, be considered as an established rule that illustrative drawings of conceived ideas do not constitute an invention, and that unless they are followed up by a seasonable observance of the requirements of the patent laws, they can have no effect upon a subsequently granted patent to another. Applying this rule to the present case, the conclusion is unavoidable that Linville and Piper had not "perfected and adopted" an invention in 1860, and that by reason of their subsequent and long continued remissness, they lost any inchoate right they might have had to priority over Reeves.

But we are not left to speculation to determine the actual character of what was done by Linville and Piper in 1860. They were induced to make sketches of different forms of wrought iron posts by the proposed erection of the arsenal railroad bridge, and their object was to devise and

present the form of post best adapted to that structure. What was done very satisfactorily appears in the testimony of Edward Crueger, a witness for the respondents, who was Mr. Linville's draughtsman at the time. He says: "Mr. Linville showed and sketched for me different forms of wrought iron bars or pieces for posts; any number of them and all shapes, of angle iron, of T iron, of round iron, and of oval iron. I can't remember the number of shapes he gave me; they were so many. He had two pieces in some posts and four in others. Finally he (Linville) rejected all the other pieces except these pieces, which we employed at the Schuylkill bridge." And the testimony of Linville and Piper is in substantial accord with this. Can there be any doubt, in view of this testimony, that the efforts thus described were experimental merely as to all the forms of post except the one which was adopted? The proofs show further that the sketch of the post, then rejected, but now in controversy, was lost with other sketches, in 1863, and that it was not reproduced until 1865, when steps were taken to obtain a patent. In the meantime Reeves had invented, "perfected and adapted," and obtained a patent for his post, and was engaged in its manufacture and introduction into public use. In point of fact, then, all that Linville and Piper did before the date of Reeves' patent can only be regarded in the light of experiment, which they abandoned, and did not take up again until the lapse of more than two years after his patent was issued.

Whether the sketches made are to be considered as an incomplete invention, not prosecuted with the required diligence, or as an experiment actually abandoned, they cannot impair the right of Reeves to be treated as the first inventor.

II. The publication of the description and plates in the *Allgemeine Bauzeitung* preceded Reeves' invention. It is a public work, and describes the post illustrated by the accompanying drawing "in such full, clear, and exact terms that any one skilled in the art to which it appertains could construct it." If Reeves' post would be the product of this description, his patent cannot be sustained.

The post described in this work is cruciform. It consists of a flat iron bar, which forms the main part of the column, with two other flat bars at right angles to it, connected by means of peculiarly shaped angle irons, so that in the centre of the connection a hollow space is formed, which produces an increase of the rigidity of the column, while the section remains which is necessary for carrying the load. Now it is apparent that the single flat bar is prescribed as the main part of the column, relied upon to bear up the weight imposed upon it, that the two other bars are designed to furnish it lateral support, and that the angle irons, while they serve the purpose of connection, are further auxiliary to it by giving it additional stiffness. This I think is the fair interpretation of both Mr. Bonzano's and Mr. Booth's translations. Following the description, then, all these bars, or at least the single one, must necessarily be incorporated in the structure. To omit them would be to discard the part prescribed as necessary to resist the compressive strain upon the column, and, therefore, to abandon the vital principle of its construction. Indeed, all these constituents must be embodied in it to fulfil the fundamental requirements of the text.

Now a column thus constituted is not the column of Reeves. It differs

from it in the necessary elements which compose it, and in the principle of its construction and operation. Four angle bars and at least one flat cross bar must be incorporated in its structure, while in the Reeves' column, three flanged bars, without any cross bar, are required, and as many more as are desired may be employed. The latter is entirely hollow and must be made so to conform to the fundamental conditions of its construction. It corporealizes the principle that increase of diameter secures additional power of compressive resistance, and, therefore, that the metal used in its construction must be thrown out as much as possible from its centre and concentrated in its periphery. Its resisting power is located exclusively in its circumference. Such a condition is certainly not indicated in the German description of that post. As before stated, the bar which traverses its diameter is an indispensable part, and as it is described as subject to the greatest compressive strain, corresponding strength for resistance must be provided in the diameter of the post. This is a vital diversity, so that the two posts can only be identified by confounding the distinct principles embodied in each of them.

In Reeves' specification it is said, "the stiffness and strength of columns made in this manner may be increased at a very moderate expense, by setting plain bars of iron between the flanges of the bars a, a, a, a, and riveted to them, and extending outward from the centre; thus, in effect, increasing the diameter of the column." Hence it is argued that a post, thus constructed, is identical with the post described in the German work. To reach this conclusion the clause quoted must be construed as directing the extension of the bars set between the flanges outwardly from the centre as the beginning, and not outwardly from the flanges.

The advantages contemplated are increased stiffness and strength of the column, and it is proposed to secure them by an increase of its diameter only in the effect due to an extension of the interposed bars. An increase of actual diameter by an enlargement of the circumference to the extent of the thickness of the bars was not designed, because that would be due only to the interposition of the bars between the flanges, not, in any sense, to their extension in either direction beyond them. An inward extension of the bars might impart increased strength to the column, but it certainly would not lengthen its diameter. As interior braces, the extensions would doubtless give additional stiffness to the column, but that would involve a distribution of material, in conflict with the general design of the patentee and the tenor of his specification, and would secure it by an agency different from the one expressly prescribed by him. An operative increase of the diameter, produced not by an expansion of the periphery, but by an extension of the interposed bars, is what the specification contemplates. A cheap method of practically increasing the diameter without a corresponding enlargement of the whole circumference is the suggestion. How is this to be attained? Solely by an exterior extension of the bars set between the flanges. When it is considered then that the effect of the extension only in increasing the diameter was contemplated, and that this will not be produced by extending the bars wholly within the column, the specification must necessarily be taken to fix the flanges as the starting-point, whence the bars are to extend outwardly, or away from the centre.

III. The only remaining reference is the "Dreyfuss Album." It is a

book of printed drawings, representing different forms of iron fabrics made by a Paris manufacturer, and bears the imprint of 1861. Under the head of "corniers" is a drawing representing a transverse section of an iron column, corresponding with one of the figures referred to in the specification of Reeves. When this book was printed does not appear, otherwise than presumptively from the imprint on its title page. When it was published or put in circulation does not appear at all, except that possession of it was obtained by the respondents after the institution of this suit.

The 15th section of the patent act of 1836—and it has been incorporated in the act of 1870—provides that a patent may be successfully opposed by showing that the thing patented "had been described in some public work anterior to the supposed discovery thereof by the patentee." It is obvious that this provision requires—1st, a description of the alleged invention; 2d, that it shall be contained in a work of a public character and intended for the public; and, 3d, that this work was made accessible to the public by publication before the discovery of the invention by the patentee.

Whether the work in evidence is a public or only a private work, intended merely for private circulation, is fairly a disputable question. It contains an illustration by a drawing of the thing intended to be represented, without verbal description; and whether this is a description at all, or such an one as the act contemplates, may well be denied on the authority of *Seymour vs. Osborne*, 11 Wall. 516, and the cases there referred to with approval. But it is unnecessary to decide these questions, as the proof is deficient in another essential particular. It is not shown that the work was published before the date of the complainant's patent. This must be directly proved. It is not deducible from the imprint on the title page. That the work was then printed may be inferred from this imprint; but when it was put in circulation or offered to the public is a distinct fact, which must be proved independently. The intended circulation of a book of a public nature may be presumed from its being put into print; but it does not follow that a work, such as the one in question, was made accessible to the public as soon as it was printed, or that it was actually published at all. As it does not appear that this book was published before the patentee's invention, as evidence it is altogether inconsequential.

The complainant is entitled to an allowance of the prayers of his bill, and a decree will, therefore, be entered for a perpetual injunction and an account with costs.

George Harding and R. C. McMurtrie, Esqs., for complainants.

C. B. Collier and Theodore Cuyler, Esqs., for respondents.

[Leg. Int., Vol. 29, p. 125.]

THE KEYSTONE BRIDGE CO. vs. THE PHOENIX IRON COMPANY.

A manufacturer of patented iron bars is not liable as an infringer, where the bars are used by others in constructing a bridge.

Opinion delivered April 1, 1872, by

MCKENNAN, C. J.—The opinion just read in the case of *Reeves vs. The Keystone Bridge Company*, renders it unnecessary to consider the

alleged infringement of the second claim of Linville's patent of 1862, and the first claim of the patent of Linville and Piper of 1865. The only claims of these patents which it is necessary to notice relate to the lower chord bars of truss bridge structures. It is in the use of these bars that the infringement is alleged to consist.

The first claim of the patent of 1862 is for the construction of the lower chords of truss bridges of series of eye bars, wide and thin, drilled eye bars, applied on edge between ribs on the bottom of the posts, etc. The form of the bars is of the essence of the claim—*wide* and *thin* bars only are claimed—and, as the only proof of infringement is, that the respondents made eye bars *round* in section, which were used in the Lasalle bridge, to perform the functions of tension chords, the patent of 1862 may be dismissed from further consideration.

The third claim in the patent of 1865 is for "the use, for the lower chords of truss frames, of wide and thin rolled bars, with enlarged ends, formed by upsetting the iron when heated by compression into moulds of the required shape." As the respondents are proved to have made only *round* chord bars, which were used in the Lasalle structure, it may well be doubted that they have infringed this claim; and especially as they are not employed or adapted to give vertical support to the roadway, which is an important function of the complainant's lower chords, and is the reason of their peculiar conformation. But waiving this, and assuming that the enlarged ends of the respondent's chord bars are formed as described in the claim, it is not to be doubted that the patent is limited to the *use* of the chords in bridge structures. This is distinctly set forth in the specification, where it is stated that "we do not claim the upsetting of bars in the manner described, nor any peculiar mode of performing the operation, but merely the *use* of chord bars for bridges, the ties of which are thus formed, so as to give additional strength to the bar where it is so much needed." The exclusive right to make chord bars in any mode is distinctly disclaimed; only their use, when formed as described, is appropriated by the patentees and forbidden to others. They in effect declare that any one may lawfully make the bars, and that no encroachment upon their rights is committed until the bars are used by being put into a bridge.

Now the respondents are iron manufacturers, and it is shown that the bridge at Lasalle, Illinois, was built by Kellogg & Clark, who obtained the iron for it from the respondents, and that the bottom chords used in it were like those claimed by the complainants. This is all the proof of infringement, and I think it falls far short of fixing any accountability upon the respondents. They made the bars, but did not use them—Kellogg & Clark did that. They did only what they had a legal right to do, and did not thereby assume any responsibility for the wrongful acts, or become involved in the unlawful purposes of others. Nor can this responsibility be imposed upon them, because privity with a wrongdoer is not necessarily to be inferred from the exercise of a legal right.

My attention has been called to the opinion of Judge Woodruff in the case of *Wallace & Sons vs. Holmes and others*, reported in the Official Gazette of the Pat. Off., Vol. I. No. 6. The case is a peculiar one. It involved the infringement of a patent for an improved lamp-burner in combination with a chimney, where the respondents made and sold the

burner alone, leaving the purchaser to supply the chimney, without which such burner is useless. And it was held that all who were engaged in the manufacture of the different parts of the combination, and using it thereafter, were infringers, for the reason that "all are *tort feorsors* engaged in a common purpose to infringe the patent, and actually by their concerted action producing that result." Now, can it be doubted that, if the respondents there had been licensed by the patentee to make and sell his improved burner, and this was all they did, the result would have been different? And yet this is substantially the attitude of the respondents here. By clear implication, the patentees have authorized the respondents to make and sell the chord bars described in their patent, and have declared that only those who use them as lower chords in bridge construction can be called to account for infringement. Having, therefore, exercised the conceded rights of manufacturers only, the respondents cannot, by any strained inferences, be implicated in the wrongful acts of others.

The bill must, therefore, be dismissed with costs.

C. B. Collier and *Theodore Cuyler*, Esqs., for complainants.

George Harding and *R. C. McMurtrie*, Esqs., for respondents.

[Leg. Int., Vol. 29, p. 332.]

STUART & PETERSON vs. SHANTZ & KEELEY.

The object and effect of McDowell patent of April 28, 1863, the form of construction, and mode of operation, differ essentially from those of Stuart & Wemys' patent for "improved guard-plates for stoves," dated May 18, 1868, and a license from McDowell is no defence to an action for infringement of the Stuart & Wemys' patent.

In equity. Opinion delivered *October 14, 1872*, by

MCKENNAN, C. J.—The complainants are assignees of Stuart & Wemys, of letters patent for an "improved guard-plate for stoves," dated May 18, 1868, with the infringements of which the defendants are charged.

It is not denied in the answer, that the defendants have been engaged in the manufacture and sale of guard-plates, in every material particular of construction and effect, like the one described in the patent; but they deny merely that their guard-plates produce the effect of directing the radial heat downward towards the floor, which is claimed by the complainants as a peculiar merit of their patented guard-plate. The complainants might, therefore, fairly have regarded the answer as admitting the fact of infringement. Not so treating it they have produced ample proof, that the guard-plates made by the defendants are substantial imitations of their own; and so that their rights have been infringed.

In justification of this infringement the defendants set up a license from W. L. McDowell, to whom letters patent, dated April 28, 1863, were granted, and allege that, in the construction of their guard-plates, they have conformed to the method indicated in that patent. It is unnecessary however to consider this license, because it can have no independent efficacy in protecting the defendants. If Mr. McDowell's invention is not the same as that of Stuart & Wemys, he could confer no right upon any one to appropriate the invention of the latter. If

both are identical in principle, construction and operation, the patent of Stuart & Wemys is void, because it is subsequent to McDowell's, and the defence of respondents is complete, irrespective of the license. The only material inquiry then is, whether the patent of McDowell describes the same invention described and claimed in the patent of Stuart & Wemys.

Two objects are aimed at in the complainant's invention: 1, the concealment of the fire-pot of the stove, and 2, the direction of the radiant heat downward towards the floor. These objects are effectuated by the employment of a guard-plate consisting of a series of projections or deflecting shields, united by ornamental tracery, and so arranged as to leave open spaces, above and outward from which the projections extend. The fire-pot is thus concealed from view, and the horizontal and upward radiation of heat is intercepted, only those rays which have a downward direction being allowed to pass freely through the chimneys. This is very concisely stated by Dr. Cresson in his deposition, in which he says, "in the complainant's patent, I find the fire-pot surrounded by a shield with perforations; these perforations are shielded with a projecting cover or roof, which conceals the fire-pot from the eye, when looked at from a distance of several feet above the floor, and cuts off a majority of the rays of radiant heat, which would otherwise be given off in an upward direction or above a horizontal line, at the same time they permit the rays of radiant heat, that will pass through these openings, to impinge upon the floor and upon objects somewhat above it. The radiant rays that I refer to are those given out by the fire-pot itself. These covers to the openings act at the same time as reflectors of a portion of radial heat, giving it a downward direction."

The object of the McDowell invention is avowedly different. In his specification he says, "in nearly all the stoves in common use, especially those having cast-iron fire-boxes or cylinders, the heat is permitted to radiate horizontally, and the said cylinders being generally kept red hot, there is consequently danger of their charring or 'setting fire' to one's clothing, or any combustible substance in its vicinity. The stoves used in railroad cars especially are generally subject to this very objectionable feature. To obviate this objection in a perfect manner, and without preventing the required diffusion of the radiating heat through the air around the stove, is the object of my invention."

This object is accomplished by "making the fender of a series of deflectors, consisting of short, hollow frustrums of cones, or other suitable forms of sheet metal, and arranging them around the outer side of the fire cylinder or box, so as to be supported together upon the said perforated supplementary top plate of the base, leaving sufficient spaces between the said deflectors, and between the latter and the stove, for the hot air to pass obliquely outward and upward from the cylinder or fire-box, into the surrounding external air."

These devices are distinguishable, therefore, not only in their form of construction, but also just as essentially in their intended mode of operation and the effects to be produced by them. In the one case the inventor proposed to permit the passage only of those rays of heat from a stove cylinder which have a downward direction, thereby causing them to impinge upon the floor and upon objects somewhat above

it, upon the hypothesis that their function in heating an apartment would thus be most usefully and effectually performed, and so he adapted the form, construction and operation of his mechanical device to that end. On the other hand it was proposed to prevent the horizontal radiation of heat from the fire-box of a stove, and thus avert the danger of burning combustible substances in its vicinity, and to allow the heated air around the stove to pass only obliquely outward and upward into the external atmosphere, and the inventor devised a mechanical contrivance peculiar in its structure and mode of operation to effect his purpose. Constructed, therefore, upon different theories, and intended for the production of different primary results, and with peculiar mechanical adaptations, the inventions in question fall into distinct categories, and so are distinguishable in form, design and mode of operation from each other.

Of the efficiency of the complainant's invention, either in the light of its practical success, or of the conformity of its alleged mode of operation to the scientific laws which govern the radiation of heat, it is scarcely necessary to speak. Its utility seems to be demonstrated by the fact that its manufacture in large numbers was fully justified by the public recognition of its merits and its preferential use, while but a very small number of the McDowell improvement has ever been made or sold. It may, therefore, be assumed that the effects claimed to be produced by it are produced to a useful and valuable extent. There may be scientific reason for denying the positive agency of the shields in deflecting the radiant heat, which is projected against them towards the floor, but this is true only in a narrow sense and by a very literal interpretation of the patent. They certainly serve the inventor's purpose of intercepting upward and horizontal radiation, and permitting the escape only of those rays which have a downward tendency. Understood in the sense which the inventor's theory indicates, they exert at least a passive agency in directing the heat to the floor, where it is most available for proper dissemination through the apartment to be heated.

A decree will therefore be entered for an injunction and an account.

Howson and Furman Sheppard, Esqs., for plaintiffs.

F. Wolfe, Esq., for defendants.

[Leg. Int., Vol. 29, p. 348.]

CHABOT vs. THE AMERICAN BUTTON-HOLE AND OVER-SEAMING COMPANY.

A patentee, while in defendants' employment, made certain experiments at their expense, for the results of which he subsequently obtained a patent. Before this a contract was made between patentee and defendants for the manufacture for defendants of a certain number of articles afterwards so patented, and the transfer to defendants of the tools used in their manufacture: *Held*, that from these facts, a license to the defendants to continue the manufacture after patent must be conclusively presumed.

In equity. Opinion delivered October 25, 1872, by

MCKENNA, C. J.—The decision of this cause turns upon the applicability of a rule of law, settled by the highest authority, to the facts presented in the proofs.

The defendant is a corporation, and has been, for a number of years,

engaged in the manufacture and sale of sewing machines. In 1866 the complainant went into the service of the defendant as foreman. During the period of his employment he was engaged in experiments with the tools and materials of his employer, which resulted in the production of the devices for which he obtained a patent on the 12th of May, 1868, in pursuance of an application dated January 27, 1868. After he had invented these devices, and while he was in the service of the defendant, between October, 1866, and August, 1867, he made a number of sewing machines for it, which embodied his subsequently patented improvements. For his services during this period he was fully compensated.

On the 30th of September, 1867, he entered into a written contract with the defendant, by which he stipulated to make for it, at a fixed price, not less than five thousand of its machines, known as the combination button-hole and sewing machines, to be in all respects equal to a specimen selected as a standard. This specimen machine had in it the devices, for which the complainant afterwards obtained a patent. The contract also provided for the free use by the complainant of the defendant's factory, machinery and tools, and for the supply by the defendant of power, light, and all the materials necessary to be used in making these machines. It also provided, that any machinery or tools bought or made by the complainant, partly or wholly at his own cost, for the purpose of facilitating the fulfilment of the contract, should, at the close thereof, be the property of the defendant, and be paid for at a price to be adjusted according to the terms of the contract. This contract seems to have been fully executed on both sides, and the relations established by it to have been terminated by the mutual consent of the parties.

Now, the question is, do these facts amount to a "consent and allowance" by the complainant of the use of his inventions by the defendant?

In *McClurg vs. Kingsland*, 1 How. 202, where the patentee was in the employment of the defendants at a weekly compensation, and while so employed made experiments at their expense, which resulted in the discovery of an improved method of casting iron rollers; where he continued to use his new methods in making rollers for them for four months, at increased wages, before he applied for a patent, proposed to the defendants to purchase his right, and take out a patent, which they declined, and made no demand on them for thus using his improvement, nor gave them any notice not to use it until a misunderstanding occurred between them; it was held, that these facts "would fully justify the presumption of a license, a special privilege, or grant to the defendants, to use the invention; that the facts amounted to a 'consent and allowance of such use,' and show such consideration as would support an express license or grant, or call for the presumption of one to meet the justice of the case, by exempting them from liability."

Now, it seems to me, that the facts in this case call more imperatively for the presumption of a license than in *McClurg vs. Kingsland*. The complainant's experiments were carried on in the defendant's factory and at its expense, and while he was in its employment in an advanced position. After he had brought them to a successful issue, he incorporated his new devices in machines, which were constructed under his superintendence in the defendant's factory, and so he continued to do for more than four months, until he made the written contract before referred to.

If the rule stated in *McClurg vs. Kingeland* is to be followed, these facts are sufficient to justify the presumption of a license to the defendant, to make and use the complainant's invention. But that presumption is strengthened by the terms of the written contract. It provided for the manufacture of a large number of machines by the use of the defendant's factory, machinery, tools and materials, the labor expended upon them, and the complainant's services alone being supplied by him, and for these his compensation was fixed by the contract. These machines were intended to be and were actually sold and distributed throughout the country as the defendant's machines. Whatever degree of popular favor might be secured for them, as the result of their peculiar features of construction and operation, it is obvious that this was the expected source of profit to the defendant, and the inducing motive on its part, to enter into the contract. When they had been introduced into general use by the defendant's efforts, were known distinctly as its machines, and a growing market for them had been established, it is not a fair inference that the parties intended that the advantages thus gained by the defendant should be lost, when the number of machines contemplated by the written contract should be supplied. On the contrary, it is stipulated that the machinery and tools bought or made by the complainant should, at the termination of the contract, become the property of the defendant, upon payment to him of their value, ascertained in the method provided for. The chief, if not the only value of a portion of these tools consisted in their special adaptation to the production of the complainant's patented devices. Without the right to use them, there is no apparent reason why provision should be made for their transfer to the defendant for a price measured by their real value. Does not this stipulation then impart an understanding on both sides, that the defendant might employ these tools for the uses for which they were peculiarly adapted?

Considering all these circumstances in their just significance, I think the case is brought within the dominion of the rule stated in *McClurg vs. Kingeland*, and that the complainant must be presumed to have consented to and allowed the use of his inventions by the defendant.

The bill must therefore be dismissed with costs.

H. T. Fenton and Furman Sheppard, Esqs., for plaintiff.

Charles B. Collier, Esq., for defendant.

[Leg. Int., Vol. 29, p. 357.]

District of New Jersey.

SEYMOUR *et al.* vs. MARSH *et al.*

Patent—Infringement—Account.

In equity. Opinion delivered October 25, 1872, by
MCKENNAN, C. J.—On the 1st of July, 1851, letters patent were granted to Aaron Palmer and S. G. Williams for "improvement in grain harvesters." This patent was reissued in divisions, one of which was numbered 1682, which was extended for seven years from July 1, 1865.

On the 8th of July, 1851, William H. Seymour obtained a patent for an "improvement on reaping machines," which was also reissued in

divisions, two of which were numbered 72 and 1683, and were extended for seven years from July 8, 1865.

The title to these several reissued and extended patents, 1682, 72 and 1683, has been duly vested in the complainants, and they constitute the subjects of the present contention.

These patents embrace several claims, the three following of which only are the defendants charged with having infringed.

1. The claim of 1682, which is for "a combination of the cutting apparatus of a harvesting machine with a quadrant-shaped platform, arranged in the rear thereof, and a sweep rake operated by mechanism in such a manner that its teeth are caused to sweep over the platform in curves when acting on the grain, these parts being and operating substantially as set forth in the specification."

2. The claim of No. 72, for "a quadrant-shaped platform, arranged relatively to the cutting apparatus, substantially as described, and for the purpose set forth."

3. The claim of 1683 for "the combination in a harvesting machine, of the cutting apparatus, with a quadrant-shaped platform in the rear of the cutting apparatus, a sweep rake mechanism for operating the same, and devices for preventing the rise of the rake teeth when operating on the grain; these five members being and operating substantially as set forth."

The defendants resist the complainants' right to a decree upon the grounds, that the reissued patents are invalid; that the inventions claimed are not novel; that such inventions will not work practically; and that they are not infringers.

The rule by which the validity of reissued patents is to be determined is well-defined and familiar. It restricts the inquiry to a comparison of the terms and import of the original and reissued letters, and a consideration of the patent office drawings and model. If from these it results that the invention claimed in the reissue is substantially described or indicated in the original specifications, drawings or model, the very case for which the act of Congress was intended to provide was shown to exist, and any change in the description or claims, which is necessary to effectuate the invention, is within its sanction. In *Seymour vs. Osborne*, 11 Wad. 544, the court says, "power is unquestionably conferred upon the commissioner to allow the specification to be amended, if the patent is inoperative or invalid, and in that event to issue the patent in proper form; and he may, doubtless, under that authority, allow the patentee to redescribe his invention, and to include in the description and claims of the patent, not only what was well described before, but whatever else was *suggested or substantially indicated* in the specification or drawings, which properly belonged to the invention, as actually made and perfected."

Now if the inventions claimed in the several reissues in question were suggested or substantially indicated in the original specifications, it is clear that the specifications might be amended so as to fully describe them, and the claims employed so as distinctly to embrace them.

To ascertain this, it is altogether unnecessary to institute a comparative analysis of the original and reissued patent, because it is plain upon inspection, that the quadrant-shaped platform, arranged as described,

claimed in reissue 72, and the combinations claimed in 1682 and 1683, are represented in the descriptions and models, and illustrated by the drawings filed with the original applications, and because this is distinctly proved by the defendants' expert witness, Homer P. K. Peck. This being so, it is no objection to the validity of the reissues, that their claims are broader than those of the original patents; or that, in view of the state of the act, these claims are broader than the patentee's invention. The very object of the act of Congress is to authorize such enlargement of the description and claims of the reissue, as to cover the invention indicated in the original, and the latter branch of the objection can only affect the reissue by avoiding the original patent for want of novelty of the invention. It cannot avail the defendants, unless it reaches back to the date of the original patent, and is founded upon proof that the invention then indicated was not void. It certainly cannot be invoked against the authority of the commissioner to allow an amended specification and to grant a reissue patent upon it, and upon this ground alone can a reissue be adjudged to be *ultra vires*.

That a machine, when first applied in practice, does not perfectly accomplish the work for which it was designed, or does not accomplish all that its invention supposed it would, is not enough to secure its rejection as a patentable invention. Correction of defects arising from imperfect material, and not involving reorganization of the machine, will not change its fundamental character, and subject it to condemnation as impracticable in its original condition. Taken as a whole in its construction and operation, if it is an advance upon the state of the art to which it appertains, furnishing a better, though still imperfect method of performing a useful function than was before available, it is not to be discarded as destitute of patentable worth. The proofs in this case show no more than that, when the complainants first put their machine in operation, some of its parts were unequal to the strain upon them, and the rake was not heavy enough to hold itself steadily in the gravel. The weak parts were strengthened, and a spring was added to hold the rake down, and the proof is plenary, that then a large number of machines was made and sold, and that they were successfully operative.

It is said, however, that this was a remodelling of the machine, and that it was not then the same machine described in the patent. But there was not the least change in its organization. It embodied still the precise devices and combinations claimed in the patents, arranged as there described, with only such amendments as were conducive to its more perfect efficiency. If any one else had constructed a reaping machine, with a quadrant-shaped platform, and the combination of elements claimed by the patentees, and had made the saws, by which the rake is operated, of sufficient strength to bear the strain upon them, and had applied a spring or other device to hold the rake down, can there be any doubt that he would be an infringer? He would be rightly so treated for the reason, that he had appropriated the combinations claimed by the patentee, and that the changes made by him did not constitute a new or different invention. The same effect only is due to the acts of the patentees, and while they have retained the constituents and organization of their invention, they have made it more efficient in operation, by strengthening its weaker parts, and by the use of auxiliary me-

chanism, to hold the rake steadily in its place. It is clear that by so doing, the identity of their invention has not been changed, nor has it been abandoned or withdrawn from the protection of their patents. Nor is this conclusion to be repelled by the speculative opinions of experts, mechanical or professional, that the invention as described in the original specification would be impracticable. Founded, as they are, upon a very literal and narrow construction of the patent, they are of but little value, when weighed against the demonstration of actual results.

The novelty of the inventions in question is constructed upon the ground, that they were anticipated by the attachment of a circular platform to a McCormick reaper by Brinckerhoff, by the construction of Burrall reapers by Joseph Hall, and by machines constructed by Plaff, McCormick, and Hussey. Of the two first of these, it is only necessary to say, that the weight of evidence is decidedly against the fact testified to by Brinckerhoff, and that the construction of Burrall reapers by Hall, prior to the complainants' invention in 1849, is satisfactorily disproved.

The other exhibits were before the Supreme Court in the case of *Seymour vs. Osborne*, 11 Watts, 516, in which the same patents involved in this case were in controversy, and were fully considered and examined by the court. Although the judgment pronounced is not conclusive in this case, yet the opinion of the court, even as to matters of fact, is entitled to the respect which is due to the high character of the tribunal and to its careful analysis of the proofs. And especially ought it to be accepted as definitive in this court when I have heard no argument to produce a doubt of the soundness of its conclusions or to lead me to suppose that they would not be reasserted upon the evidence in this case. I must, therefore, hold that the Platt & McCormick reapers did not embody the complainants' inventions and did not disprove their novelty.

Additional evidence has been produced in this case in reference to the construction by Hussey of reapers with a quadrant-shaped platform. In *Seymour vs. Osborne*, the proof was that one machine only embracing this feature was constructed by Hussey in the fall of 1848, and it was adjudged by the court to be an experiment which was abandoned. Thomas J. Lovegrove, who was examined as a witness in that case, and omitted all mention of a quadrant-shaped or curvilinear platform on a Hussey machine, testifies now that Hussey attached to the back of the platform of some of his machines an additional angular piece which finally developed itself, in 1847 and 1848, into a part of a circle, the guide board being sawed so that it could be easily bent. He was reminded of this after the lapse of more than twenty-three years by reading the depositions of the two witnesses who testified in regard to the Hussey machine in *Seymour vs. Osborne*. Even if such remarkable obliviousness and such a lapse of time do not impair the credibility of his testimony, he is altogether indefinite as to the number of machines made with the curvilinear attachment or as to the fact that any one of them was sold or used. The only one of which he speaks with any distinctness is the old retained machine in Hussey's shop in Baltimore, to which evidently the testimony in *Seymour vs. Osborne* related. But he has no recollection of ever seeing this machine, or one like it in use.

The question then stands just as it did in *Seymour and Morgan*, except

that there is evidence—certainly not beyond the reach of criticism—tending to show that a curvilinear platform was attached to more than one machine; but there is no additional evidence that machines thus constructed were actually used and were successfully operative. There is no reason, therefore, why the deductions of the court in that case are not just as appropriate to the evidence in this. Thus applying them, these machines must be treated as experiments, in nowise affecting the novelty of the complainants' invention.

It is earnestly contended that the machines constructed by the respondents do not infringe upon the patents of the plaintiffs. The argument is rested mainly upon the fact that the mechanism employed in the machines constructed by the defendants is different from that described in the patents. This is undoubtedly true, and so it was also in *Seymour vs. Osborne*. But the question is not as to the identity of the actuating forces, but whether the devices and combinations of devices claimed by the patentees, are embodied in the defendants' machine, and operate to produce the same result in substantially the same way.

Now, in these machines is to be found, a quadrant-shaped platform, to the cutting apparatus, as is described and claimed in reissued patent No. 72.

There is also to be found the combination claimed in No. 1682, viz., the cutting apparatus with a quadrant-shaped platform arranged in the rear thereof, and a sweep-rake operated by mechanism so that its teeth are caused to sweep over the platform in curves while acting on the grain.

And there is also to be found, the combination claimed and described in No. 1683 of the cutting apparatus, with a quadrant-shaped platform in the rear thereof, a sweep-rake mechanism for operating the same, and devices for preventing the use of the rake teeth when operating in the grain.

This combination embraces the three elements which compose the other, and its merit consists chiefly in the value and novelty of the results accomplished by it. That result is the automatic removal of the grain, as it is cut from the platform, and its delivery crosswise upon the ground and out of the way of the team or machine when cutting the succeeding swath. The same result is produced by the defendants' machine, but do the mechanical agencies employed operate substantially in the same way with those described in the patents? Rakes similar in construction are used in both the complainants' and defendants' machines, but in the complainants' the rake has a vibrating or reciprocating motion, while in the defendants' it has a revolving motion. This is said to constitute a material difference of operation. But it is to be observed that the essential function of the rake is to sweep over the platform in the arc of a circle, thereby discharging the cut grain at the rear of the platform, so as to be out of the way of the team and machine on their next round. If this function then is performed in the same way in both cases, as it manifestly is, what matters it, whether the rake is made to move from the rear to the front of the platform to resume its appointed work in a horizontal line, or in the orbit of a circle? In neither case is there any difference in the result or the essential method of effecting it, and there is, therefore, no noticeable difference in operation.

The complainants' patents having expired, they can have a decree for an account only. To this they are entitled, and it will accordingly be entered.

Henry Baldwin, Jr., Esq., for complainants.

J. W. Maynard and J. O. Parker, Esqs., for respondents.

[Leg. Int., Vol. 29, p. 357.]

SAMUEL WETHERILL *et al.* vs. THE PASSAIC ZINC COMPANY *et al.*

A license to use a process ceases with the death of the original patent, and the use after the patent is extended is an infringement.

The validity of the plaintiff's patent was not disputed, nor the fact of the use of the plaintiff's patented process; but it was insisted, that by reason of certain contracts the defendants were licensed to use the invention during the extended term of the patent, at their New Jersey works.

The case was argued by George Harding for complainants, and by E. W. Stoughton and George Gifford for defendants.

Opinion delivered *October, 1872*, by

MCKENNA, C. J.—There is no contention as to the complainant's title to the invention described in the patent set up in the bill, or as to the use of such invention by the defendants. The patent is for an improved process in the manufacture of white oxide of zinc, which Manning & Squier claim to have acquired a license to use during the term of the original patent, and the real and decisive inquiry in the cause is, whether, by the true construction of this license, or by operation of the eighteenth section of the act of July 4, 1836, re-enacted by the sixty-seventh section of the act of July 8, 1870, the use of this process was authorized after the term of the extended patent began.

The construction of the agreement of March 17, 1860, between Manning and Squier and Wetherill is not altogether free from difficulty. Its phraseology is peculiar. It provides for the sale by Wetherill to Manning and Squier of two-thirds of his mineral lease of land in Lehigh county, from Jacob Correll, including the steam engine, tools, and all appurtenances, and also of "two-thirds of all his machinery, furnaces, engines, retorts, buildings, and materials whatsoever, now on or about the premises of the Wetherill Zinc Company, in the town of Wetherill, Pennsylvania, with rights to use all his patents and processes for the manufacture of zinc oxide, metallic zinc, retorts, etc., which said Wetherill now has or has in contemplation to obtain. . . . It being understood that the patents heretofore referred to mean only those which he holds in his own right." The interpretation of this contract is to be determined by the sense in which the parties intended to use the terms employed to express it; and this must be gathered from the instrument itself, irrespective of declarations, written or oral, by either party, as to his understanding of its meaning, or as to his motives in making it. But in aid of such an inquiry, it is proper to consider facts cognate to the subject of the contract and within the knowledge of the parties to which it may, therefore, be presumed that the stipulations of the contract were intended to be applied and by which their effect and meaning were to be governed.

The subject-matter of the first clause of the contract was the Correll mineral lease, two-thirds of which is sold to Manning and Squier; "*and also,*" a two-thirds interest in the machinery, furnaces, engines, buildings and materials then on or about the premises of the Wetherill Zinc Company at Wetherill, "*with*" rights to use Wetherill's patents and processes for the manufacture of zinc oxide, etc., which he then had or had it in contemplation to obtain. Now it is clear that the interest conveyed in this lease, and in the machinery, etc., are separate and independent, because that is expressed in unambiguous and appropriate words. But are the rights to use the patents and processes dissociated from the use of the machinery, etc., by terms of like import? They are granted together, apparently as inseparable parts of a single subject-matter, or, at least, as if they had some understood dependency upon each other. Two-thirds of the ownership of the buildings, machinery, etc., are transferred, not as a distinct subject, but "*with*" rights to use certain patents and processes related to the uses for which the buildings and machinery were designed and employed. They are thus associated in the same clause, and are conveyed together in terms implying that the right to one is necessary to the appropriate enjoyment of the other. Where then were these processes to be used and in what connection? Where else than at the place at which appliances were provided which might be adapted to the employment of all the processes comprehended in the grant, as they already were to some of them? For what other purpose can it be supposed the parties understood Wetherill to unite Manning and Squier with him in the ownership of the premises, unless it was to secure their continued and successful use in the production of zinc in some of its forms? and what more conducive to this purpose than to authorize the use of necessary methods, of which he had the monopoly? I do not, therefore, think it an unwarranted inference from the words and tenor of the contract, that the parties intended the right to use Wetherill's patents and processes to be exercised in connection with the buildings, machinery, furnaces, engines, retorts, and materials granted with it, and consequently that such use was intended to be local and restricted.

It is urged, however, that a right to use Wetherill's patented process for the manufacture of zinc oxide was not conveyed by the contract. This conclusion is founded upon the alleged effect of the concluding sentence of the first clause of the contract, which is, "it being understood that the patents heretofore referred to mean only those which he holds in his own right." Before the date of the contract, Wetherill had transferred interests in his process patent to Charles J. Gilbert and others, and was then only part owner of it, and it is, therefore, argued that he did not hold it in his own right. That he was owner in part of this patent is undoubted, and that to the extent of his interest, he held it in his own right is also clear. Now, the qualifying words above quoted apply only to such patents as he was the apparent, but not the real owner of, nor do they exclude patents of which his tenure was not exclusive. He was the patentee of the process for manufacturing white oxide of zinc, and to the extent of his untransferred interest he was competent to dispose of it, because he held it in his own right. He did dispose of part of this interest, expressly limiting the operation of his conveyance

to such interests as he was the real owner of. But it must be further observed that this process patent was the only one for the manufacture of zinc oxide then held by Wetherill. The right to use it was clearly conveyed by the contract, and it was the only patent then to which the words of the grant would apply. To exclude it from the operation of an unambiguous conveyance, by giving this effect to the restricting clause which its terms do not clearly require, would violate a familiar rule of construction, which assigns to a proviso the office only of qualifying the context, not of withdrawing from a grant a subject plainly embraced by it.

But assuming that the construction given to the contract is erroneous, and that the license in dispute was unrestricted as to the place of its enjoyment, it is necessary to inquire whether it extended beyond the terms of the original patent, by the stipulation of the contract, or by operation of the eighteenth section of the act of 1836.

A license or contract for the use of an invention is subject to the same rules of construction which apply to any other contract. The intention of the parties as expressed in the contract is to be ascertained, and effect must be given to it accordingly. A transfer of an interest in a subsisting patent will not extend beyond the term of the patent, unless there are words indicating an intention to convey more than a present interest. This rule was applied in *Wilson vs. Rousseau*, 4 How. 646, and in numerous other cases, and I think is clearly recognized in *Railroad Co. vs. Trimble*, 10 Wall. 367, and in the unreported case of *Nicholson Pavement Company vs. Jenkins*. In the *Railroad Co. vs. Trimble* the language of the contract manifestly embraced an extended term of the patent. In reference to it the court say: "The language employed is very broad. It includes alike the patents which *had been* issued, and all which *might be* issued thereafter. . . . The *entire inventions* and all alterations and improvements, and *all patents* relating thereto, whensoever issued, to the extent of the territory specified, are within the scope of the terms employed. No other construction will satisfy them. Upon the fullest consideration we have no doubt such was the meaning and intent of the parties." The language employed in the *Nicholson Pavement Co. vs. Jenkins* is not so broad, but the court held it to be equally significant of an intention to convey an interest in the extended term. "Manifestly something more was intended to be assigned than the interest then secured by letters patent. The words 'to the full end of the term for which the said letters patent are or *may be* granted, necessarily import an intention to convey both a present and a future interest, and it would be a narrow rule of construction to say, that they were designed to apply to a reissue merely, when the invention itself, by the very words of the assignment, is transferred."

The words of the contract in this case are "with rights to use all his patents and processes for the manufacture of zinc oxides, metallic zinc, retorts, etc., which said Wetherill *now has or has in contemplation to obtain*." Now, I think, the significance of the words "*now has or has in contemplation to obtain*" is merely to individuate the patents which the contract was intended to embrace, and has no reference to the renewal or extension of such patents. Two classes of subjects are referred to, patents for the manufacture of zinc oxide, metallic zinc, and

for retorts, which Wetherill then held, and patents for the like subjects which he intended to obtain, but which had not been granted. They were intended to show that not only processes of which he held the monopoly by patents but also those of which he proposed to secure the monopoly, by obtaining patents therefor, were to be covered by the contract. And this interpretation is confirmed by the fact that he had shortly before filed caveats for inventions relating to the manufacture of zinc, which he had not then perfected, and for which, of course, when matured, he then contemplated obtaining patents for. In the absence of any words, therefore, indicating an intention to deal with more than a present interest in the patent in question, the license stipulated for must be held to run only during the term of the original patent.

And the same conclusion is applicable to the scope of the license granted by S. T. Jones to the Passaic Zinc Company, because by the terms of the agreement between him and Wetherill, he was authorized to sell licenses to use "the invention of the improvement in the process for manufacturing the white oxide of zinc for which he, Wetherill, has applied for letters patent," only "for the whole term of the patent which may be granted." This is an express limitation of Jones' authority to sell licenses to the term of the patent for which Wetherill's application was then pending; and no one, therefore, purchasing a license from him would acquire a larger interest than he had the power to convey.

But is the right to use the process in question secured to the licensees, during the term of the extended patent, by the eighteenth section of the act of 1836? It is thereby enacted that "the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein." The construction and effect of this clause have been considered by the Supreme Court in several cases, involving the right to use machines after the end of the original term of the patent, but in no case has the effect of the clause upon a license to use a process been expressly determined by that court. But if the court has defined the meaning of the statute, a loyal respect for its authority demands that it should be followed, although the subject-matter to which its ruling was applied may be different from that out of which the present controversy has grown.

In *Wilson vs. Rousseau*, 4 How. 669, the question was presented whether, by force of the eighteenth section of the act of 1836, an extended patent granted to Woodworth's administrator for his planing machine, enured to the benefit of an assignee under the original patent, and the court held that it did not, but that it protected only purchasers or owners of machines during the original term, in the mere use of them after the end of that term. This conclusion necessarily involved a determination of the true meaning and scope of the eighteenth section; and in reference to it the court say: "The extension of the patent, under the eighteenth section, is a new grant of the exclusive right or monopoly in the subject of the invention for seven years. All the rights of assignees or grantees, whether in a share of the patent or to a specified portion of the territory held under it, terminate at the end of the fourteen years, and become reinvested in the patentee by the new grant."

From that date he is again possessed of the "full and exclusive right

and liberty of making, using, and vending to others the invention," whatever it may be. Not only portions of the monopoly held by assignees and grantees as subjects of trade and commerce, but the patented articles or machines throughout the country, purchased for practical use in the business affairs of life, are embraced within the operation of the extension. This latter class of assignees and grantees are reached by the new grant of the exclusive right to use the thing patented. Purchasers of the machines, and who were in the use of them at the time, are disabled from further use immediately, as that right became vested exclusively in the patentee. Making and vending the invention are prohibited by the corresponding terms of his grant. And again, "against this view, it may be said, that 'the thing patented' means the invention or discovery, as held in *McClurg vs. Kingsland*, 1 How. 202, and that the right to use 'the thing patented' is what in terms is provided for in the clause. That is admitted, but the words, as used in the connection here found, with the right simply to use the thing patented, not the exclusive right, which would be a monopoly, necessarily refer to the patented machine, and not to the invention; and, indeed, it is in that sense that the expression is to be understood generally throughout the patent law, when taken in connection with the right to use, in contradistinction to the right to make and sell."

The "thing patented" is the invention; so the machine is the thing patented, and to use the machine is to use the invention, because it is the thing invented, and in respect to which the exclusive right is secured, as is also held in *McClurg vs. Kingsland*. The patented machine is frequently used as equivalent for the "thing patented," as well as for the invention or discovery, and no doubt when found in connection with the exclusive right to make and vend, always means the right of property in the invention, the monopoly; but when in connection with the simple right to use, the exclusive right to make and vend, being in another the right to use the thing patented, necessarily results in a right to use the machine, and nothing more. Then as to the phrase, "to the extent of their respective interests therein," that obviously enough refers to their interests in the thing patented, and in connection with the right simply to use, means their interests in the patented machines, be that interest in one or more, at the time of the extension.

This view of the clause, which brings it down in practical effect and operation to the persons in the use of the patented machine or machines, at the time of the new grant, is strengthened by the clause immediately following, which is, "that no extension of the patent shall be granted after the expiration of the term for which it was originally issued."

To the same effect is *Bloomer vs. McQueenan*, 14 How. 547. The opinion of the court was delivered by the chief justice, and while he adopts fully the reasoning of the opinion in *Wilson vs. Rousseau*, he expounds, at some length, the reasons for which the distinction is made in the act of 1836, between assignees of a share of the monopoly, and the purchasers of machines to be used in the ordinary pursuits of business.

A broad distinction is thus indicated between the use of an invention and the use of a patented machine. While the right to the use of the invention expires with the end of the term of the original patent, the right to the continued use of the machine, which embodies it, is protected.

The law did not intend to revive an assignment or grant which expired with the term of the original patent, but to protect a species of tangible property, sold by the patentee, the value of which depended chiefly upon the owner's right to use it, and which, without some saving provision, would fall within the grasp of the exclusive rights vested in the patentee by the extension. It was manifestly, then, something less than the entire right to use the invention which the act contemplated. What that is, is clearly stated in the opinion of the court, not as a dictum of the judge who delivered it, but as an exposition of the meaning of the act, which was necessary to a decision of the cause. "The thing patented" is the subject of the use, and the court say, were these words employed in the act in connection simply with the right to use, they refer only to the patented machine, and not to the invention. This, then, is an authoritative definition of their significance in the clause in question, and they must, therefore, be taken to mean a specific machine, and in connection with the other words of the clause, to confer a right to use it, "nothing more." And it has since been held, that this right is restricted to the mere use, and does not cover the reconstruction of the machine. It necessarily follows that this saving clause is applicable only to inventions which are susceptible of embodiment in a substantial and tangible form, and not to those which consists in a formula for producing prescribed results, and when those results are obtained there is an end of the thing patented, and which as often as it is employed in practice, involves the renewed use or reproduction of the entire invention.

But it is urged that where a process requires the use of a peculiar machine or apparatus for its practice, the right to use the process until the apparatus is worn out is within the protection of the act. If the title to both was concentrated in the same person and by the same patent, the argument would have perhaps unanswerable force. But where it is held by different persons and under distinct patents, it is difficult to see how a grant of an interest in one can carry with it any interest in the other. Burrows was the patentee of a furnace adapted to the use of Wetherill's process, and by Burrow's assignment the respondents acquired a right to use it. But that assignment did not touch Wetherill's invention, and they had no right to practice it in the Burrows' furnace without Wetherill's authority. When they obtained his authority, the contract which granted it was the sole source of their right, and had no dependent relation to a distinct contract with another. If Burrows' assignment conveyed an interest in his invention alone, and gave no right whatever to the use of Wetherill's, an extension of the patents for either or both of them could not operate to establish an inseparable connection between them. The only effect of the saving clause in question is to continue the right to use a patented machine, after the renewal of the patent, where such right was derived from an assignment or grant by the patentee, and it cannot, by any constructive expansion, be made the source of a right in the creation of which the patentee had no agency.

Two cases have been referred to, in which a broader effect is given to the act of 1836 than is ascribed to it in *Wilson vs. Rousseau*, and which demand only a brief notice.

The first of these is *Wilson vs. Turner*, Taney's Circuit Court, Dec. 278,

in which the defendant was the owner of a Woodruff planing machine, by virtue of an assignment of an interest in the original patent, and claimed the right to use it after the extension of the patent. Chief Justice Taney delivered the opinion of the Circuit Court, dismissing the bill on the ground that the act of 1836 extended the entire right vested by the assignment during the term of the renewed patent. The cause went to the Supreme Court, and was there heard in connection with *Wilson vs. Rousseau*. Although the decree of the Circuit Court was affirmed, it was expressly for the reasons stated in *Wilson vs. Rousseau*, the chief justice concurring in the opinions in both cases. The restricted operation there given to the act is irreconcilable with the construction of it in the court below, and the judgment must, therefore, be taken as a distinct rejection of the broad views of the chief justice in the Circuit Court, and as indicative of a change of opinion on his part.

In *Day vs. The Union India Rubber Company*, 3 Blatch. 488, the learned judge of the Circuit Court adopted the views of Chief Justice Taney in *Wilson vs. Turner*, and held that the act of 1836 protected the continued use of a process by a licensee under the original patent. Upon this interpretation of the act the judge rested his decision of the cause, and supported it by an elaborate and impressive argument. This case also went to the Supreme Court, and is reported in 20 How. 216. The same judge who delivered the opinion in *Wilson vs. Rousseau* also delivered the opinion of the court in this case, and he puts its decision upon the ground that the license set up by the defendants in terms covered the extended term of the patent, and he does not advert at all to the view taken in the Circuit Court of the act of 1836. It is obvious, therefore, that the effect of the act was an immaterial question, and that the silence of the court in regard to it does not imply any approval of the views of the judge of the Circuit Court. Thus unimpugned by any authorized doubt or denial of its soundness, *Wilson vs. Rousseau* must be regarded as determining the meaning of the act, and its consequent inapplicability to the defence of the respondents.

The patent of Wetherill was extended on the 13th of November, 1860. The Passaic Zinc Company used his process after that date, and so was an infringer. It is unnecessary, therefore, now to determine the effect of its agreements with Manning and Squier upon its liability as an infringer after their date.

The complainants are entitled to an injunction and an account, and a decree will be entered therefor, but if the respondents, within twenty days, give bond in such sum, with security, as the court or a judge thereof shall approve, to secure the payment of the profits and damages hereafter decreed against them, the issuing of the injunction will be suspended until the further order of the court.

[Leg. Int., Vol. 29, p. 365.]

*Eastern District of Pennsylvania.***VAN CAMP BUSH, APPELLANT, vs. JOSIAH CRAWFORD, THE ASSIGNEE OF DUNKLE & DRIESBACH, BANKRUPTS, APPELLEES.**

1. Notes drawn by one partner, in the firm name, apparently in the course of partnership business, without mala fides or actual knowledge by the holder of want of authority, or intended misapplication, entitle the holder to their allowance against the bankrupt estate of the firm.
 2. A, a member of a partnership, offered B, for indorsement, his individual notes, representing, however, that they were to be used for purposes of the firm. B refusing to indorse the same, A, at B's suggestion, substituted the firm notes, which B indorsed, and subsequently paid and became their holder.
- Held*, that although it appeared that the notes, after said indorsement, were used by A to pay his separate indebtedness, and in fraud of his copartners, B might recover against the firm, there being no evidence of bad faith or actual knowledge by him of the intended fraud.

Appeal from an order of the District Court disallowing proof of the appellant's claims. Opinion delivered *November 8, 1872*, by

MCKENNAN, C. J.—The appellant is the holder of negotiable paper, purporting to be made and issued by the bankrupt firm of Dunkle & Driesbach. He made the necessary proof of his claims before the register in bankruptcy, but the District Court rejected them, in part, because he was not a bona fide holder without notice of facts affecting their validity.

Dunkle and Driesbach were partners in business in Philadelphia, succeeding McCurdy & Dunkle, both of which firms were customers of the firm of which the appellant was a member. In August, 1868, Dunkle informed the appellant of the contemplated change in his firm by the retirement of McCurdy and the accession of Driesbach, "and that he might want a favor" of him. In December following, he again called upon the appellant and asked his indorsement of two notes for \$3000 each, drawn by himself individually. Upon inquiry by the appellant, he was informed that the notes were for McCurdy for the balance of the stock; that the new firm of Dunkle & Driesbach had purchased the goods and were to pay for them; that the notes were for this purpose, and as the reason why they were drawn in Dunkle's own name, that he did not know it would make any difference in the security of the indorser. Upon further inquiry, and a detailed explanation of the condition of the firm of Dunkle & Driesbach, the appellant was satisfied of its entire solvency. Thereupon, and in pursuance of the appellant's suggestion, new notes were drawn in the name of the firm, which he indorsed and was subsequently required to take up. Instead of using these notes in the partnership business, Dunkle applied them to the payment of his individual indebtedness.

It is undoubted that, as between the partners themselves, this use of the firm credit by Dunkle was unauthorized and fraudulent; but the question is, has such a relation to the transaction, on the part of the appellant, been shown, as will make him a holder, mala fide, of these firm notes.

Each member of a partnership is the agent of the firm, and is competent to bind it in any transaction within the general scope of the partner-

ship business. "The act of each partner," says Chancellor Kent, 3 Comm. 40, 41, "in transactions relating to the partnership, is considered the act of all, and binds all. He can buy and sell partnership effects, and make contracts in reference to the business of the firm, and pay and receive, and draw and indorse, and accept bills and notes. . . . The act of one partner, though on his private account and contrary to the private arrangement among themselves, will bind all the parties, if made without knowledge of the arrangement, and in a matter which, according to the usual course of dealing, has reference to business transactions by the firm." The notes in question were executed by one of the partners in the name of the firm, and if they had reference to the business transacted by the firm, they were valid evidences of its indebtedness, binding upon it in the hands of a bona fide holder.

It is urged that the appellant is not a bona fide holder, for the alleged reason that his conversation with Dunkle and the form in which the notes were first presented to him, apprised him that they concerned the capital of one partner, and were inconsistent with the business of the firm.

The only knowledge of the transaction the appellant had was derived from the representations of Dunkle, and these were distinctly to the effect that the notes were for McCurdy for the balance of the stock, which the firm had purchased, and that the firm was to pay them. Now this does not import an intimation that Dunkle desired the accommodation for his individual benefit, or to provide his share of the partnership capital, but if it was true, the transaction was strictly pertinent to the partnership business, and either partner might execute negotiable paper of the firm to fulfil the partnership obligation. The only reason the appellant had to doubt the truth of the representation was the fact that Dunkle, in the first instance, asked his indorsement of his individual notes. This fact, taken by itself, would undoubtedly stamp the transaction as one in which Dunkle alone was concerned; but followed by the explanations which he gave, it cannot be considered as indicative of an intended appropriation of the notes for his exclusive benefit. The most that can be said of it is, that it was admonitory to greater caution and further inquiry. But this is not enough, even if it evinces gross negligence. There must be knowledge of facts impeaching the validity of the notes. The fault of Dunkle's meditated fraud must be implanted in the appellant's title, so that his assertion of a claim against the firm would necessarily subject him to the imputation of bad faith.

This is now the prevalent rule in England, as it is also in many of the courts of the United States, and in the Supreme Court of the United States. It was first applied by Lord Mansfield in *Miller vs. Race*, 1 Burr. 452; and although it was subsequently departed from in *Gill vs. Cubitt*, 3 B. & C., and other cases, yet they have all been overruled, and the principle announced by Lord Mansfield is now the undisputed law of England: *Crook vs. Jadis*, 5 Barn. & Ald. 909; *Backhouse vs. Harrison*, Id. 1088; *Goodman vs. Harvey*, 4 Ad. & E. 870. It has been adopted in Connecticut, in *Brush vs. Scribner*, 11 Conn. 388; in Massachusetts, *Worcester Co. Bank vs. Dorchester and Milton Bank*, 10 Cush. 488; in New York, *Hall vs. Wilson*, 16 Barb. 548; and in Pennsylvania, *Phelan vs. Moss*, 17 P. F. Smith, 62, in which the leading English and

American cases are collected by Mr. Justice Read, and the rule is shown to rest upon a firm foundation of authority and commercial necessity. And it has received the definitive approval of the Supreme Court in *Goodman vs. Simonds*, 20 How. 343.

The notes here having been drawn by one partner, in the firm-name, apparently in the course of partnership dealing, and without notice of facts from which the appellant was bound to infer that they were made without authority, or that a misapplication of them was contemplated, he is a bona fide holder of them, and is entitled to their allowance as debts against the bankrupt partnership.

The order of the District Court is therefore reversed, the exceptions to the register's report are disallowed, and the report is confirmed.

C. E. Morgan, Jr., and Clement B. Penrose, Esqs., for appellant.

George Junkin, Esq., for appellee.

[Leg. Int., Vol. 30, p. 29.]

J. COOKE LONGSTRETH, ASSIGNEE IN BANKRUPTCY OF WATSON & DE YOUNG, BANKRUPTS, AGAINST GEORGE PENNOCK, EXECUTOR OF ABRAHAM L. PENNOCK *et al.*

Rent for store occupied by bankrupt, and subsequently by his assignee, and where there were sufficient goods to satisfy rent on distress, should be paid in full by assignee up to the time of the surrender of the property.

On the 19th of December, 1867, the bankrupts rented from Abraham L. Pennock *et al.*, for the term of one year from January 1, 1868, the front store and other portions of premises No. 533 Market street, at an annual rental of \$5000, payable quarterly, and entered upon possession under the lease. Subsequently, another portion of the basement was let to Watson & De Young, by a verbal agreement, and the rent for the whole, for the year commencing January 1, 1870, was reduced to \$4500 per annum, the tenants continuing their occupancy of the premises without any new or other written agreement. The accruing rent was paid in full to July 1, 1870. On the 25th of January, 1871, Watson & De Young, who still continue their occupancy of said premises as tenants, were adjudicated bankrupts by the United States District Court of this district, on creditors' petition, filed January 20, 1871, and an assignment of all their estate under the bankrupt law was duly made on the 28th day of March, 1871. The goods of the bankrupt (which were at all times sufficient, if distrained on, to have satisfied the rent in arrear) remained on the premises, and the same were occupied by the assignee until he had sold all the goods, which brought an amount largely exceeding the rent claimed to be in arrear, and until May 24, 1871, when the premises were surrendered to the defendants in this action. They claimed from the assignee rent of said premises, at the rate of \$4500 per annum from July 1, 1870, to May 24, 1871; allowing certain credits, this amount was paid to the defendants by the assignee, he taking a receipt from them in which they agreed, that in case this payment should be disallowed in whole or in part, to refund so much as would be necessary to indemnify the assignee.

On the 26th of October, 1871 the assignee wrote the defendants the following letter :

"*Gentlemen* :—Under a recent decision of the Circuit Court of the United States for the Western District of this circuit (*In re Butler*, 6 Nat. Bank Reg. p. 501), to which my attention has been called by James Parsons, Esq., register in bankruptcy, it becomes my duty as assignee in bankruptcy of Watson & De Young, to demand from you the return under your refunding receipt of June 13, 1871, of all the rent received by you on that date from Charles Vezin, former assignee of Watson & De Young, bankrupts, that accrued up to the time of his appointment as assignee. Will you favor me by a prompt response to this demand, and oblige yours truly,

"J. COOKE LONGSTRETH, Assignee."

The defendants having refused to comply with this demand, this action was brought.

The case was argued on 7th October, 1872, before Strong, J., and McKennan, C. J.

Mr. Longstreth, for the plaintiffs, cited the above case in *re Butler*, 6 B. R. 501.

MCKENNAN, C. J.—I am reported as having concurred in that decision. I did so; but I said that I did not adopt the reasons for it stated in the report.

Mr. Townsend, for the defendants, cited *Appold's case*, 6 Phila. Rep. 469.

October 9, 1872, it is ordered by the court that judgment be entered for defendants against the plaintiff on the case stated.

[Leg. Int., Vol. 30, p. 169.]

THE DORSEY HARVESTER REVOLVING RAKE CO. vs. J. S. MARSH,
GRIER & COMPANY.

1. A corporation may hold and work a patent; and a grant of letters patent from the Commonwealth of Pennsylvania incorporating the "Dorsey Revolving Harvester Rake Company," will be presumed to have been accepted.
2. The grant of a reissue by an acting commissioner of patents is valid, it is a judicial act, and it cannot be impeached, except for matter on its face, or in a proceeding for the purpose.
3. The purpose of a reissued patent considered. The original and the reissue must harmonize.
4. Terms imposed where the patentee may be protected by compensation.

Opinion delivered April 7, 1873, by

MCKENNAN, C. J.—The bill in this case is founded upon an extended patent to Owen Dorsey, for an improvement in harvester rakes, dated March 4, 1870.

Every material allegation of the bill is denied in the answer; and the validity of the patent and the sufficiency of the complainant's proofs have been contested in an argument of unusual minuteness of elaboration. It has failed to convince me that the complainant is not entitled to a decree, and the reasons for the conclusion reached by me can perhaps be more briefly and lucidly stated, by an examination of the points of that argument, in the order in which they were presented.

The suit is brought by the complainant as a corporation, and its existence as such is denied in the answer. It is proved by the exhibition of letters patent, issued under the great seal of the State of Pennsylvania, signed by the governor and countersigned by the secretary of state.

That the governor had authority to cause these letters to be issued is indisputable, and if they do not warrant a presumption that they were rightfully issued, and therefore, that what the law prescribes as necessary to be done to that end had been done, it is difficult to perceive what significance they have. To the acts of public officers within the general scope of their power, some degree of faith and credit is due, and it is no stretch of presumption to consider that they have faithfully performed a duty imposed upon them by law, with a proper observance of all its preliminary conditions. Therefore, it has been held, and is settled law, that patents granted by a State or the general government are to be taken as prima facie evidence that they were regularly granted, and that they import conformity to the pre-requisites of the laws authorizing their allowance. *Trenton Railroad Co. vs. Stinson*, 14 Pet. 458; *Rubber Company vs. Goodyear*, 9 Wall. 797.

Nor has the second branch of the objection, that the acceptance of the charter is not shown, any better foothold. This fact is undoubtedly essential in the process of constituting a body politic, and it must, therefore, be proved where the existence of the corporation is put in issue. But it is well settled that it will be presumed from facts, which are consistent only with such hypothesis, without proof of any express declaration to that effect. Thus, where a law is enacted applicable to a designated corporation, the mere passage of the law will not sufficiently prove its adoption by the corporation. But where it appears that the law was enacted upon the application of the corporation, its acceptance is a necessary inference from that fact. And so where a general law is in existence, authorizing the creation of a corporation by letters patent to be issued by a public officer upon the preliminary performance of certain things by the persons to be incorporated, and letters patent are duly issued, reciting the performance of the required conditions, and investing the corporation with the franchises of a body politic, and these letters are obtained and produced by the corporation for the very purpose of establishing its existence, can any doubt remain that they were granted at the instance of the alleged corporation, and were accepted by it? The possession by a grantee of a deed for his benefit is everywhere sufficient prima facie evidence of its acceptance by him. Why, therefore, will not the same facts authorize a like presumption as to a corporation? The proofs here leave no doubt that the complainant was duly constituted a corporation according to law.

It is further denied that the complainant has any right to acquire and hold the patent in question. The corporate faculties of the complainant are not to be ascertained by reference exclusively to the statutes authorizing its creation. Notice will also be taken of any supplementary or general statute pertinent to the inquiry. Now the Pennsylvania statute referred to in the complainant's letters patent authorizes the creation of a corporation upon the fulfilment of certain prescribed conditions, and they are recited to show that these conditions have been complied with, and as a consequence it is declared that the applicants are constituted a body politic, "with all the rights, powers, and privileges," conferred upon it by "all the laws of the Commonwealth." The creation of the corporation was thus complete, but its powers are not to be sought in these acts alone. The supplementary

act of February 27, 1867, extended the scope of the original act, so as to embrace companies thereafter formed for the purchase and sale of patents granted by the authority of the United States, and of rights and licenses under said patents. The right to acquire and hold patents is here clearly given to corporations organized under the original act, thus amplified. If the patent in controversy is related to the purpose of the complainant's organization, the right to take and hold it is expressly conferred upon it. It is not requisite that this purpose should be proved by direct evidence, but it may be inferred from the name of the corporation alone. So it was held in *Blanchard's Gunstock Turning Factory vs. Warner*, 1 Blatch. 271, where it was inferred that the corporation plaintiff "had power enough to purchase an invention which would tend to facilitate the purposes of its incorporation, as indicated by its corporate name," in the absence of proof of any law expressly conferring it. But in this case the law expressly authorizes the purchase and tenure by the complainants of a patent, which is cognate to the purpose of its incorporation. That it is founded upon the Dorsey patent I think is manifestly indicated. It adopts the name of Dorsey's invention set forth in his patent as part of its own, but to individuate the patent more distinctly, it superadds Dorsey's name, so that its corporate style, "The Dorsey Revolving Harvester Rake Company," denotes exclusively Dorsey's invention. I think, therefore, the inference is both legitimate and obvious, that the purpose of the complainant was to operate in reference to the Dorsey invention, and that it has the right to acquire and hold his patent.

The third point is purely verbal. The bill alleges that the Dorsey patent was duly extended by the commissioner of patents, and the proof is that the extension was granted by S. H. Hodges, acting commissioner, and it is, therefore, urged that the bill must be dismissed because the proof does not support the averment. The gist of the averment is, that the patent was extended by an officer having the authority to grant it, and if the proof substantially supports it, there is no discordance between them. A provisional officer who is invested by law with the functions of the commissioner of patents is properly described as commissioner, so far as the efficacy of his official acts is concerned, and for this purpose only is it necessary to describe him at all. The validity of his act, not the verbal accuracy of his title, is the essential subject of inquiry.

The fourth and fifth points may be considered together. They affirm that the acting commissioner did not acquire jurisdiction to consider Dorsey's application for an extension, and that his patent was not extended until after the expiration of the original term.

The actual incumbent of a public office is presumed to be in the lawful possession of it, and no affirmative proof of his title is required to support his official acts. This is a familiar maxim. Accordingly, it was held in *Winans vs. The York and Maryland Line R. R. Co.*, 17 How. 41, that "the court will take notice, judicially, of the persons who, from time to time, preside over the patent office, whether permanently or transiently, and the production of their commission is not necessary to support their official acts." So, therefore, the contingency upon which the examiner in chief is authorized to assume the duties of

commissioner, is primarily to be taken to exist from his actual discharge of these duties. That this presumption is conclusive, in a contest between third parties, is, I think, a logical result of the principle affirmed and applied in the *Rubber Company vs. Goodyear*, 9 Wall. 796. But at any rate the burden of showing the non-existence of the prescribed contingency is upon the party who denies the validity of the ostensible officer's acts. That burden the respondents here have not sustained. They have shown only that the commissioner was at the patent office part of the day on which the extension was granted, not later than 11½ o'clock A. M.; while it appears that the commissioner, in writing, informed the chief examiner of his intended absence at the time of the decision of Dorsey's application, and that the case was actually decided by the chief examiner. There was an actual abdication by the commissioner of his official functions, and an exercise of them by the chief examiner; and, as this was done with a distinct reference to the provisions of the act of Congress, the inference that they were strictly observed is legitimate and fair.

The granting of an extended patent is a judicial act. Authority to that end is conferred upon the commissioner of patents by act of Congress. The manner in which it is to be exercised, and the time within which it may be exercised, are prescribed by the act. The extension must be granted before the term of the original patent expires; but when it is granted, in apparent conformity to the act of Congress, the decision of the officer has the attributes of a final judgment. It is not subject to appeal or revision. This is the clear import of numerous decisions of the Supreme Court. In *Seymour vs. Osborne*, 11 Wall. 516, the court says: "When the commissioner accepts a surrender of an original patent, and grants a new patent, his decision in the premises, in a suit for infringement, is final and conclusive, and is not re-examinable in such suit in the Circuit Court, unless it is apparent upon the face of the patent that he has exceeded his authority; that there is such a repugnancy between the old and new patents that it must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original patent." And this doctrine is asserted with equal distinctness, in reference to the granting of an extended patent in the *Rubber Company vs. Goodyear*, 9 Wall. 798. It is there said: "The law made it the duty of the commissioner to examine and decide. He had full jurisdiction. The function he performed was judicial in its character. No provision is made for appeal or review; his decision must be held conclusive until the patent is impeached in a proceeding had directly for that purpose, according to the rules which define the remedy, as shown by the precedents and authorities upon the subject."

It is plain, from these authorities, that, in a suit by a patentee against an infringer, it cannot be shown that the commissioner who granted the patent exceeded or irregularly exercised his authority, except by matter apparent on the face of the patent, and that it is conclusively valid until it is successfully impeached in a direct proceeding properly instituted for that purpose.

We have, then, a case where a patent has been extended, with every apparent legal sanction, which it is sought to invalidate by parol evi-

dence contradictory of its purport, and claimed to show that it was granted at a time and place contrary to law. This is a forbidden inquiry in this case, and it is, therefore, unnecessary to notice the evidence presented in relation to it.

The invention of Dorsey belongs to the widely useful class of mechanical devices designed to facilitate the harvesting of grain. His special object was to produce a device which would automatically separate the standing grain in suitable gavels, press it against the vibrating knives of a reaping machine, and sweeping it in the arc of a circle, deposit it in the rear of the machine, out of the way of the team when it passed around again. By no pre-existing invention was this double effect produced. The function of discharging the cut grain had been performed by a rake sweeping over the platform of the machine, and of separating and gathering the standing grain to the cutters by a revolving reel. These were the more recent and approved automatic devices for these purposes, preceding the invention of Dorsey. But in all the literature of the art, which has been so exhaustively exhibited, no instance is shown in which the gathering office was performed by a rake.

To effectuate his object, Dorsey constructed a continuously revolving rake, with arms attached by a pivot to a shaft or head around which they revolve, and so as to allow of their being elevated or depressed by an inclined camway on which they rest. Guided by the cam, the rake is caused to fall in front of the cutter bar into the standing grain, thereby separating it for each gavel, pressing it against the cutting knives, and sweeping it over the platform in the arc of a circle, depositing it behind the horses and out of their track on their next round.

The novelty of the operation consists in the performance of the functions of gathering the grain to the cutters and discharging it from the platform by the same instrumentality, and in the mechanical means employed to guide and cause it to rise and fall to perform these functions together. And in these features the complainant's invention is distinguishable from the various devices exhibited by the respondents. I do not propose to consider them in detail, but content myself with saying, that in none of them is a rake employed to separate and gather to the cutters the standing grain, nor is there in any of them a similar pivotal attachment of a rake-arm by which it is capable of rising and falling in its revolving movement; and in all of them, except in Seymour's, and Palmer and Williams', the cut grain is discharged directly behind the cutter. I can have no doubt, therefore, of the novelty of the invention.

It is urged that the patent in controversy is void, because the reissue is not for the same invention described in the original.

That a reissued patent cannot be allowed for an invention different from the one of which the original patent is the basis is undoubtedly true. But it is equally true, that any feature of the invention, which is actually a part of it, that was only suggested or indicated in the specification or drawings, may be distinctly described in an amended specification and protected by a reissued patent, and that accordingly the claims of the patent may be restricted or enlarged to cover the real invention.

It is a just rule that patents are to be construed liberally, so as to sustain the right of the inventor. Mere verbal discrepancies, therefore,

are entitled to but little consideration, especially where in view of the mechanism devised, the functions it was designed to perform, and its mode of operation, there is substantial accordance between the original and reissued patents. Nor is it any objection to a renewed patent that part of the original invention is omitted. This an inventor may do, because the public may use it, and there is nothing in the policy or terms of the patent act which forbids it. *Carver vs. The Braintree Manufacturing Company*, 2 Story, 438.

I do not think, however, that it requires any great liberality of construction to harmonize the original and reissued patents. The main ground of the objection is, that in the reissue the invention is described as a continuously revolving gathering and discharging rake, which descends into the standing grain in front of the cutter, so as to gather the grain for each gavel, and that the gathering function thus defined is not suggested or indicated in the original patent. In the latter it is said "the rake-head is brought by a sweeping descent upon the front edge of the platform, and in so doing draws the uncut grain towards the cutters." And again, describing the operation of the rake, "by continuing its movement the rake reaches over the heads of the grain and gradually descending by the guide-rail, draws the wheat towards the cutters; by this means I dispense entirely with the reel used on harvesters for drawing the grain to the cutters." Now the reference here to the gathering function of the rake is distinct. It is expressly stated to be a substitute for the reel, the sole function of which is to gather the grain to the cutters. And it operates so as to reach over the heads of the grain and descending gradually draws or gathers the grain to the cutters. Every step in the process is not as fully described as in the amended specification, but it is obviously implied that the rake, reaching over the heads of the grain, was intended to descend below them into the grain, as it could thus only perform its appointed duty of drawing it to the cutter. And in so operating it must necessarily effect a separation of the grain between the rake-head and the cutter-bar from that standing in the rest of the field. The description, therefore, plainly points to a rake adapted to gather the grain to the cutter, as well as to discharge it from the platform, and, in so performing its intended office, necessarily passes down into the grain in front of the cutters, and divides it so as to form the succeeding gavel in the standing grain.

Again, it is objected that the original and amended specifications are vitally irreconcilable in this: that in the former is described a rake attached to the end of a diametrical arm; "each pair of arms formed of metal or wood, with an opening at their half length of a longitudinal form, so as to allow them to pass over the end of a vertical turning shaft;" and that this description is omitted in the latter. Diametrical arms are undoubtedly one form of embodiment of the patentee's conception, but they are not the only one to which the principle of his invention is susceptible of application, nor is it so declared. His patent covered equivalent, although formally different, mechanical devices, which operated in the same way and to the same end with diametrical arms. Hence it was legitimate to modify the specification so as to secure protection broadly to the real invention of the patentee against any form

of infringement. This is well and accurately illustrated by acting commissioner Hodges, in his opinion, where he says, in reference to the distinctive merit of the invention: "It lies in attaching the rake-arm by a pivot to a shaft, around which it revolves, and may be made at the same time to rise and fall upon the pivot. By this construction the rake may be guided in the direction desired. These are the essential features of the invention, and equally so whether the arms are diametrical or merely radial. After trying the latter, Dorsey adopted the former, because he found he could use the limb opposite the rake as a means for guiding it. But the combination of the revolving movement of the arms and their swinging movement upon their pivots, which alone gave him the power to direct the path of the rake at will, was common to both, and constitutes the merit of the contrivance."

Nor does the objection apply with any greater effect to the claims of the reissue. It has been already shown that the original and amended specifications describe a continuously revolving rake, with a pivotal connection to the shaft on which it revolves, which performs the functions of gathering and discharging the grain, so arranged as to enter the uncut grain in front of the cutters, and discharge the cut grain in the arc of a circle, and so as to separate the grain which is to form the next gavel in the standing grain.

It follows, therefore, that the claims of the reissue which embrace the device and combination of devices by which these functions are performed are in entire harmony with the specification.

Another objection to the validity of the patent is, that the patentee has not so described his raking device and its arrangement as to enable an ordinary mechanic to make, construct and use the same. Absolute precision as to details is not required in the specification. It is only intended as a guide; but it is not the sole instructor. Nor is it addressed merely to ordinary mechanics; but the test of its sufficiency is, whether a person skilled in the art to which the invention appertains can construct and use it. The special skill of the mechanic, derived from familiarity with the art, may be applied in aid of the instruction given by the specification; and this skill may be exerted to modify any direction in the specification as to the matters of mere adjustment or adaptation of the invention to its intended use, else the authority to employ it at all is of but little value. "It will, perhaps, rarely happen, even where the utmost vigilance and care are observed, that the machine or structure will be so accurately described as that the description can be literally and strictly followed in every particular. The skillful mechanic will see that in some particulars there is some vagueness, and some discretion is required; but that fact will not invalidate the patent." 3 Fish, 555. But it is a complete answer to the objection, that the thing which, it is argued, cannot be done, has actually been done. In 1858 Adam Reese acquired a license to use the Dorsey invention, and, in substantial accordance with the specification and drawings, he made and applied to it over fifteen hundred machines, which worked successfully. Against such a practical demonstration, argumentative speculation, reinforced though it may be by the untested opinions of experts, will be of little avail.

In the *Union Sugar Refinery vs. Matthiessen*, 2 Fish, 626, Mr. Justice

Clifford said to the jury: "You will regard the well-known substantial equivalent of a thing as being the same as the thing itself; so that, if two machines have the same mode of operation, do the same work in substantially the same way, and accomplish substantially the same results, they are the same; and so, also, if the parts of two machines, having the same mode of operation, do the same work in substantially the same way, and accomplish substantially the same result, these parts are the same, although they may differ in name, form or shape."

The invention of Dorsey consists of a rake with its arms attached by a pivot to a shaft, with which it revolves, and so that it will rise and fall as the arm passes along the surface of a cam by which this latter movement is regulated and controlled. It operates with a continuous revolution, descending with the inclination of the cam in front of the cutter-bar, thence sweeping backward in the arc of a circle to the rear of the platform, where it is elevated by the cam to clear the frame of the machine, and passing again to the front, repeats the movement. Its functions are to descend into the standing grain in front of the cutter, thus separating the grain which is to form the next gavel, to draw or gather it to the cutter, and when cut, on to the platform, and then to sweep it across the platform in the arc of a circle and to discharge it on the ground out of the way of the return of the machine in cutting its next swarth. These are the characteristic features of the invention.

Now the alleged infringing devices embodied in the defendants' machines "have substantially the same mode of operation, do the same work in substantially the same way, and accomplish substantially the same results" as those claimed by the complainants. In the defendants' machine is to be observed a rake-head with an arm attached to a crown-wheel or head with which it revolves, and to which it is pivotally connected, so that it will rise and fall under the guidance and control of a cam-way. It revolves continuously, descending into the grain in front of the cutter, separating the gavel, gathering it to the cutter and traversing the platform in the arc of a circle, discharges the grain in the rear by a side delivery, out of the way of the return of the machine, and then rising, clears the machine and renews the operation. It is obvious, then, that the functions and mode of operation of both devices are substantially the same. In their constructions the differences are formal rather than substantial. Instead of a vertical post, the shaft and head of which are of one piece and revolve together, to which the rake-arm is attached, as in the Dorsey invention, the defendants employ a vertical iron shaft which passes through the centre of a metal head, to which the rake-arm is attached, and which revolves around this shaft instead of with it, but the mode of operation and the results accomplished by both devices are the same. In Dorsey's drawings and model a diametrical rake-arm is shown; in the defendants' machine the rake-arm is radial, but both are pivoted at the same point to the central revolving head, and are alike guided and governed by the cam in their rising and falling movement. The defendants use a cam formed in the segment of a circle, while Dorsey's cam is a complete circle; but I think the part of the latter at its lowest inclination where the defendants' cam is open, exerts no essential agency in guiding the rake in its traverse on the platform, and that, therefore, the difference in form between the two is immaterial.

Upon the whole case, I am of opinion the complainant is entitled to a decree, but it ought to be so framed as not to subject the defendants to any avoidable loss or injury. The complainant is not a manufacturer of reaping machines, so far as appears, and will be adequately protected by the payment of a just compensation for the use of the Dorsey invention. The defendants have an extensive establishment and a large capital invested in it for the manufacture of machines, and seem to have conducted their business under the impression that it was no invasion of the rights of others. A sudden stoppage of it would be disastrous to them, and would not benefit the complainant.

A decree will, therefore, be entered for an injunction and an account; but no injunction will issue until the further order of the court, if the defendants within thirty days from the date of this decree, file a bond in such form and amount, and with such security, as the court or judge thereof may approve, to secure to the complainant the profits and damages which they may ultimately be decreed to pay.

George Harding, Esq., for complainant.

David Wright, Esq., for respondents.

[*Leg. Int.*, Vol. 30, p. 281.]

PHILADELPHIA AND READING RAILROAD COMPANY *vs.* KENNEY.

Dividends declared and payable by railroad companies during the last five months of 1870 are not liable to taxation by the United States. A seizure by collector of United States revenue is illegal.

Opinion delivered August 21, 1873, by

MCKENNAN, C. J.—This is an action of trespass *vi et armis* for the alleged illegal seizure and detention of the goods and chattels of the plaintiff, mentioned in the declaration. The defendant alleges in his plea that he was justified in making his seizure, because, he says, the plaintiff, on the last day of November, 1870, declared a dividend of \$1,570,580.01, on its capital stock, as part of its earnings, income and gains, made and accrued between the 1st day of July, 1870, and the 30th day of November, 1870, which was made payable to its stockholders on the 27th day of December, 1870; that the plaintiff thereby became liable to pay to the United States, a tax of 2½ per cent. on this dividend, amounting to \$33,469.75, which was duly entered by the assessor of internal revenue upon the list made out by him according to law, a certified copy of which he furnished the defendant as collector; and that upon the default of the plaintiff, in performance of the duty imposed upon him by law, he made the seizure complained of.

To this plea the plaintiff has demurred generally.

Assuming that the authority under which the defendant acted is sufficiently set out in the plea, two questions are presented by the demurrer, upon which the decision of the cause depends.

First. Is the action of trespass an appropriate remedy for the alleged wrong?

Second. Was the tax imposed upon the plaintiff authorized by law?

An executive or ministerial officer, who acts under the authority of a tribunal of general jurisdiction, is not responsible for an excessive or illegal exercise of its powers, but where a special or limited jurisdiction

only is possessed, such officer is bound to see that he acts within the scope of the legal powers of the tribunal which commands him. This is the rule in England, by which the accountability of ministerial officers is determined. Thus in the case of *Marshalsea*, 10 Co. Rep. 76, Sir Edward Coke says: "If the Court of Common Pleas, in a plea of debt, doth award a *capias* against a duke, earl, etc., which, by the law, doth not lie against them, and the same appeareth in the writ itself, yet, if the sheriff arrest them by force of the *capias*, although that the writ be against law, notwithstanding, inasmuch as the court hath jurisdiction of the cause, the sheriff is excused." And so the law has ever since been held by the English courts.

But in the United States the scope of the rule has been extended, so that it is applied broadly to the protection of ministerial officers, who execute the mandates of legally constituted tribunals of every rank or character, having either a general or special jurisdiction of the subject matter to which the process relates. *Beach vs. Furman*, 9 Johns. 230, is a conspicuous illustration of this. It was an action of trespass against a constable for seizing and selling the property of a woman under a warrant commanding him to levy of her goods and chattels, a penalty imposed by law for refusal to work on the highways, from which duty women were expressly exempted. The court, Kent, C. J., says: "Now, the overseer of the highways was the person to designate, in the first instance, and to deliver to the commissioners the names of the persons liable to be assessed, and he was also the officer to adjudge what persons were in default, and to demand the warrant. In the exercise of this authority the overseer may have returned the names of persons not liable to assessment, and he may have adjudged persons in default who were not in default. . . . It would be against the obvious principles of justice and policy to make the ministerial officers act, in a case like this, at their peril, when they have no right to judge and are required to act. They are only responsible as trespassers when they act under the authority of a person who had no jurisdiction in the case, or when they exercise that authority irregularly." In *Savacool vs. Boughton*, 6 Wend. 170, Mr. Justice Marcy discusses the subject fully, and shows that the doctrine of *Beach vs. Furman* is in harmony with the leading American cases and with the principles of justice and reason.

The same rule is settled as the law of Pennsylvania by the repeated decisions of its Supreme Court. *Moore vs. Alleghany*, 6 Har. 55; *Cunningham vs. Mitchel*, 17 P. F. Smith, 81. In the last of these cases, Mr. Justice Agnew says: "In the case of public officers, an inferior acting within the scope of his warrant, when apparently regular, is always protected, unless the authority issuing it was without jurisdiction. It has been a question how far this authority extends, when the superior authority acts irregularly and illegally. But now the doctrine appears to be settled, as it should be, that even in such case the inferior has to look only to his warrant."

Although there is an apparent inconsistency in the cases arising from the application rather than the statement of the rule, as in *Thurston vs. Martin*, 5 Mason, 496, and others, the discussion must be considered as ended by the recent judgments of the Supreme Court of the United States, in accordance with the doctrine of the cases above referred to.

"It is well settled now," say the court, in *Erskine vs. Hohnback*, 14 Wall. 616, "that if the officer or tribunal possess jurisdiction over the subject matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued."

This was reaffirmed in *Hafin vs. Mason*, not yet reported, and it was held that the duties of a collector of internal revenue in the enforcement of a tax are purely ministerial, and that the assessment certified to him is his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject matter, constitutes his protection.

The rule by which the liability of ministerial officers is to be determined is thus clearly defined, and firmly established. They are not accountable for the erroneous judgment of the tribunal, whose mandate they are to enforce, or even for an excessive or illegal exercise of its powers. Where they are bound to act they are responsible only for their own errors. But the protection afforded them is not without limit or qualification. It is an essential condition that the tribunal, whose order is executed, should have jurisdiction of the subject matter of its judgment. This is distinctly held in all the cases. If payment of a tax is enforced, there must be legal authority to impose it, and this the executive officer must see to at his peril.

The distinction between the said assumption of power to impose a tax, where a ministerial officer will not be protected, and an illegal exercise of it, where he will, is well illustrated in *Moore vs. Alleghany City*, supra. "Were the authorities of Alleghany destitute of the power to levy taxes, or limited to the assessment of persons only, an attempt, in the first case, to assess and collect the tax, and, in the second, to extend the assessment to property, might be deemed so utterly nugatory as to afford its officer no protection. But possessing the right to levy and collect a tax for city purposes from persons and property, a mistake of the class of persons, or the species of property subject to it, will not amount to usurpation."

The decisive inquiry, then, in this case is, was the imposition of the tax collected from the plaintiff authorized by law? If it was, the assessment by the assessor and the list certified and delivered by him to the defendant, as collector, constituted a complete justification of the alleged trespass. If it was not, the defendant is not protected by the process under which he acted.

By the 122d section of the act of Congress of June 30, 1864, 15 Stat. at Large, 284, a duty of five per cent. was imposed upon interest on bonds issued, on dividends declared, and on undistributed profits earned by railroad and other corporations, which duty the officers of said corporations were required to return to the assessor and pay to the

commissioner within thirty days after said interest and dividends became due and payable, and they were authorized to retain the duty so paid out of the interest and dividends due to bond and stockholders. This is the only act, prior to July, 1870, which imposed a tax on interest and dividends payable by railroad companies. On the 14th of July, 1870, an act was passed by Congress—16 Stat. at Large, 261—the 17th section of which repeals the 122d and other sections of the act of 1864, by providing that, after the 1st day of August, 1870, no further taxes shall be levied or assessed under them. It is plain, therefore, that the tax described in the plea could not be assessed and collected under the act of 1864, and that, unless it was authorized by the act of 1870, there is no warrant anywhere for its assessment. The 15th section of the latter act is the only part of it for which this effect can be claimed, and it enacts:

"That there shall be levied and collected for and during the year 1871, a tax of two and one-half per centum on the amount of all interest or coupons paid on bonds or other evidences of the debt issued and payable in one or more years after date by any of the corporations in this section hereinafter enumerated, and on the amount of all dividends, earnings, income or gains hereafter declared by any bank . . . railroad company, etc., . . . whenever and wherever the same shall be payable . . . and on all undivided profits of any such corporation which have accrued and been earned and added to any surplus, contingent or other fund, and every such corporation having paid the tax aforesaid is hereby authorized to deduct and withhold from any payment on account of interest, coupons and dividends an amount equal to tax of two and one-half per centum on the same."

The word "levied" in the beginning of the section is evidently employed as convertible with assessed or imposed, so that the import of the enactment is, that interest, dividends, and surplus earnings shall be subjected to a tax of two and one-half per cent. for and during the year 1871. The plainly expressed meaning of the section would, therefore, seem to be, that the tax to be levied was a tax for the year 1871, and not for the whole or any part of any previous year, and that it was to be imposed upon the enumerated subjects during and within the year 1871, and not during or within any other year. Interpreting the words of the section, then, according to their ordinary sense, interest falling due, and dividends declared and payable within the last five months of 1870, were excluded from the operation of the tax.

But it is urged that the phrase "hereafter declared," applied to dividends, subject to the tax, dividends declared and payable before 1871. There is certainly no ground, either in the import of these words or in their collocation in the law, for extending their qualifying effect to interest or undivided profits. Only dividends are properly spoken of as declared; not so either interest or undivided earnings, and to apply the term to them would be both inappropriate and unmeaning. It must be taken as referring exclusively to dividends, and interest and undivided earnings must be considered as affected by the unqualified import of the clause which makes them taxable for and during the year 1871.

Nor is there any better reason for interpreting this phrase to describe only dividends declared after August 1, 1870. It is not found in the

same section with that date, and while, *ex vi termini*, it applies to the date of the passage of the act, this obvious reference cannot be changed by the exigencies of a mere arbitrary construction.

But were these words used in any other sense than as referring to a period occurring after the passage of the act, and for and during the year 1871, as they naturally import, and not with intent to impose a tax upon dividends exceptionally? To preserve the congruity of legislative action, and to harmonize the several sections of the act of 1870 itself, they must be thus interpreted.

From the origin of the system of internal revenue taxation, through the whole course of legislation on the subject, interest on corporate indebtedness, dividends of profits and undivided earnings were treated as closely related if not inseparable subjects of taxation. They were associated in the same section, the same tax was imposed upon them, and the same mode provided for its return and collection; and this relation was preserved in their relief together from the five per cent. tax, by the repeal of the 122d section of the act of 1864. They are indeed but a single subject, because they are the product of the inseparable exercise of corporate franchises, and are only nominally distinguishable by being set apart for different classes of recipients. They were therefore uniformly dealt with as cognate subjects of taxation. Now to hold that dividends were intended to be taxed, and that interest and undivided profits were not, ought to be the result of an unequivocal declaration of Congress to that effect. Aside from this there is no reason for such a conclusion by construction. But if anything in the act is plain, it is that the tax upon interest and undivided profits was limited in its operation to the 1st of August, 1870, and that the new tax was not to be imposed upon them during the remainder of that year or until the year 1871. Now the same limitation is expressly applicable to the taxation of dividends, and the new tax to be levied upon them is also declared to be for the year 1871. A discriminating construction by which they would be subjected to the new tax before 1871, would then not only disregard the analogies of former legislation, but it would necessarily characterize a tax, expressly declared to be "for and during the year 1871," as a tax for and during five months of the year 1870.

The 16th section of the act of 1870 directs the mode and time of making a return of the income and profits subject to taxation under the 15th section. It requires a return to be made to the assessor of the district or his assistant "of the amount of income and profits and taxes as aforesaid . . . on or before the tenth day of the month following that in which any dividends or sums of money became due or payable as aforesaid," and the act of July 13, 1866, section 11, requires the payment of the tax on or before the last day of the month. Under these provisions it is the obvious duty of corporations to return the dividends and sums of money due by them, and to pay the tax to which they are liable within the periods designated. If they are not bound to do so, it can only be for the reason that the dividends declared and the sums due by them are not subject to taxation. Now the tax imposed by the 15th section was not to be "levied or collected" until the year 1871. If no tax was to be levied or demandable until the year 1871, it is plain that the provisions in relation to the return and payment of the tax imposed

are inapplicable to dividends declared and payable in 1870; and if no provision is made for the return and assessment of dividends then declared, as in other cases, is not the conclusion irresistible that they were not intended to be placed in the category of subjects upon which a tax was imposed?

Whatever signification, then, the words "hereafter declared," as applied to dividends, may have, they cannot be interpreted to subject dividends to a discriminating tax, against the uniform course of previous legislation and the clear meaning of the preceding words, which limit the tax imposed to the year 1871, and to subjects properly classified as belonging to that period.

Even if they can be regarded as casting doubt upon the meaning of the law, that doubt must be resolved in favor of the citizen. The exercise of the power of taxation is not to be affirmed upon conjectural or arbitrary inferences. No burden is to be taken as imposed upon the citizen which the government has not clearly made it his duty to assume. Nor can any portion of his property be exacted for any purpose, except in pursuance of an unambiguous mandate.

Whatever degree of liberality, therefore, may be allowable in the construction of statutes relating to the revenue of the government, there is neither reason nor justice in expanding them, by a strain upon the ordinary import of their words, to give effect to a hypothetical legislative intention.

It results, then, that dividends declared and payable by railroad companies during the last five months of 1870, were not subject to taxation; that the tax described in the plea was assessed without authority of law, and that the seizure of the plaintiff's property was without justification.

Judgment upon the demurrer must therefore be entered for the plaintiff.

[Leg. Int., Vol. 30, p. 329.]

SUMNER et al. vs. THE CITY OF PHILADELPHIA.

The board of health have not an unlimited arbitrary right to detain a vessel after there is no longer an appearance of malignant disease upon it.

In equity. Opinion delivered *October 6, 1873*, by

McKENNAN, C. J.—Upon the facts found by the referee, whose report it is agreed shall be treated as a special verdict, I am satisfied the defendant is liable in damages for an undue detention of the plaintiff's vessel.

A very large discretion is necessarily intrusted to the board of health in the administration of quarantine regulations; but it is not unlimited, nor is it to be exercised arbitrarily. The board may exert their powers to avert substantial danger to the public health, and so, as a measure of mere precaution, they may cause the detention of an infected vessel for a reasonable period, but when the process of cleansing and purification is completed, and there is no longer an appearance of malignant disease upon the vessel, she cannot rightfully be prevented from proceeding to sea. A further detention of her is an invasion of the owner's property, for which he is entitled to compensation.

Such is the import of the proviso to the 4th section of the Pennsylvania statute of 29th January, 1818, Pamphlet Laws, 38. If the gen-

eral power of the board of health is not so qualified, then the proviso has no qualifying sense whatever, but is a superfluous reiteration of that part of the body of the section, which confers upon the board a discretion to detain a vessel, upon which a malignant disease has appeared, for "such further time as they may deem necessary," and which manifestly comprehends the power to discharge it at any time. But if this were not the effect of the proviso, the extent of the power of the board is limited by the clear necessity of its exercise for the public protection, for it is not to be taken as the intention of the Legislature to invest them with irresponsible authority to withhold private property indefinitely from its owner, whereby he would be subjected to great injury and loss.

It is apparent, in this case, that the detention of the plaintiff's vessel after the 2d of September, 1870, was purely arbitrary. However upright the motives of the board may have been, their apprehension of danger to the public health from the vessel was merely speculative. At any rate, the vessel was then in a condition of cleanliness and freedom from malignant disease, which entitled her owners to take her to sea. This they were not permitted to do, and, therefore, they are entitled to compensation for the loss and expenses caused by her detention until the 7th of November following. The items and amount of these damages have been correctly ascertained and adjusted by the referee: and it is ordered that judgment be entered for the plaintiffs for twenty-two hundred and seventy-three dollars and thirty-six cents (\$2273.36), (being the same found by the referee), with interest from November 7, 1870.

Henry Flanders and David W. Sellers, Esqs., for plaintiffs.

George D. Budd, Esq., and Charles H. T. Collis, city solicitor, for defendant.

[*Leg. Int.*, Vol. 30, p. 329.]

SAMUEL B. ROBBINS, MASTER OF THE SOUTHERN BELLE, vs. S. & W. WELSH.

A consignee who has a right to designate where to discharge the cargo must select a suitable and safe place for its discharge.

Appeal from the decree of the District Court.

In admiralty. Opinion delivered *October 6, 1873*, by

McKENNAN, C. J.—The master of a vessel, who has the right to select the place to discharge his cargo, is bound to select a customary dock or wharf for the delivery of the kind of goods with which his ship is freighted, and it must be suitable and safe for the deposit of them. Upon a consignee, who has stipulated for this right, a reciprocal obligation rests. He must designate a place at which the delivery is practicable, and where it can be effected without unreasonable delay or exposure of the vessel to avoidable danger. "In all commercial and maritime affairs, time is an element of great value and importance," and, therefore, for any unnecessary detention of the vessel, without the fault of the master, where demurrage is not expressly stipulated for, the consignee is impliedly liable for damages in the nature of demurrage. *Randall vs. Lynch*, 2 Camp. R. 352; *Phil. and Read. R. R. Co. vs. Northern*, 2 Benedict's R. 1. Where, from the crowded state of the dock or other temporary obstruction, delay must ensue in unloading the vessel, the

appropriate remedy of the owner is for damages for the detention, and he ought not to resort to another place of discharge without the consent of the consignee. But if it is impracticable, at the time, to deliver his cargo at the place appointed, and awaiting a berth would be attended with imminent danger of injury to his vessel, he may demand of the consignee the selection of another place of discharge, and upon the consignee's neglect or refusal to appoint one, he may himself resort to another place, as convenient as may be to the one fixed by the consignee.

In the present case, the consignees, having the right by the bill of lading so to do, named Willow street wharf, in the city of Philadelphia, as the place for discharging the cargo. The libellant took his vessel to that wharf, but finding all its berths occupied and the running ice rendering it very dangerous to remain there, he removed her to Washington street wharf. The proofs show clearly that a delivery of the cargo at Willow street wharf was, at the time, impracticable, and that to await an opportunity to unload the vessel there would have been attended with great peril to her. Upon being informed of these facts, as they were, it was the duty of the consignees to designate another place where the discharge of the cargo could be promptly begun and safely effected. This they did not do until the afternoon of December 22, when they wrote a note to the master, in substance directing him to deliver his cargo at some good wharf in the immediate neighborhood of Willow street wharf. This notice should have been given at least two days before, and the delay is solely imputable to the respondents, for the libellant seems to have been importunate in urging the consignees to appoint a suitable place of delivery. For this unnecessary detention of the vessel the consignees must be held accountable.

But the libellant was in fault in discharging part of his cargo at Washington street wharf, because it was done not only without the permission, but against the express dissent of the consignees, and because, from circumstances known to the libellant, it was not a place suitable or convenient for them. For the expenses and loss to which they were thereby subjected the vessel is liable.

The selection of the Central wharf, to which the vessel was removed from Washington street, seems to have been approved, or at least assented to, by both parties. But the delivery could not be completed there because the cargo was not removed as rapidly as it was discharged, and there was not room for the whole of it. A delay of at least one day was thereby occasioned, and it became necessary to take the vessel to an adjoining wharf, where her discharge was finished; and for this delay and the cost of removal the consignees are fairly chargeable.

The account will then stand thus :

The libellant is entitled to damages in the nature of demurrage for three days	
detention at \$50 per day.....	\$150 00
And to cost of removing vessel from Central wharf to Smith's.....	20 50
And to balance of freight money retained (gold).....	200 00
	<hr/>
	\$370 50
The respondents are entitled to expenses incurred and loss sustained by delivery	
of part of cargo at Washington street wharf.....	187 00
	<hr/>
Leaving due libellant.....	\$183 50

And for this sum in gold, with interest from January 4, 1872, a decree will be entered in favor of the libellant with costs.

Henry Flanders, Esq., for libellant.

Morton P. Henry, Esq., for respondents.

[Leg. Int., Vol. 30, p. 149.]

CAMBLOS vs. THE PHILADELPHIA AND READING RAILROAD-COMPANY.

DINSMORE vs. SAME.

Of two bills in equity filed at the same time, one was at the suit of an express carrier against a railroad company to prevent the continuance by them of a competing business in which they were engaged, as he alleged without authority in their charter, also to compel the allowance by them of certain disputed facilities and accommodations which he claimed in his own business upon their line, and also to prevent the continuance by them of certain alleged overcharges for transporting his express freights. The other bill was against the same company at the suit of one of their stockholders. It contained the same allegations and prayed like relief. He was a party in the interest of the express carrier, and, pending the disputes, had bought the stock in order to promote that interest by thus bringing suit. A preliminary injunction asked under each bill was refused under both, because if either complainant had any equitable right, it was not, in such a case, enforceable until final hearing.

A mandatory order, as a method of enforcing the concession of a right, is generally inconsistent with the object and appropriate functions of a preliminary injunction; and unless there is an extraordinary special exigency, will not be made interlocutory.

Under a bill against a corporation by a stockholder, a preliminary injunction is not ordinarily grantable where the question is not that of preventing forfeiture of the charter from being incurred, but only that of alleged erroneous administration of corporate facilities.

Here if the defendants had infringed their charter, the mischief was already done, and preliminary injunction could not avert a forfeiture. The value of their stock in other respects could not be impaired by their participation in the profits of a competing business. Their liability to an action at the suit of the express carrier was a risk which the stockholder had voluntarily sought. Therefore, if he were a complainant for his own interest, he could not ask a preliminary injunction.

If any act of the defendants prejudicial to the *express carrier* was also an infraction of their charter, *he* was not, on the latter account, entitled to any redress. As to him, the only questions were those of alleged injury to his business of a freighter; and those questions, unless there had been a judgment at law, were not of such urgency as necessarily to require interlocutory decision.

The charter of a railroad company authorized them to charge certain limited rates of toll to others for passage over the rails; but did not limit their charge for transportation by themselves. The absence of a limitation of the latter charge did not enable them, as common carriers, to make *unreasonable* charges.

A statutory limitation of a railroad company's charges impliedly excludes, within the limit, any question of their unreasonableness, unless rebates from the maximum, or additions to, or rebates from any lower established rates, are *systematically* unequal. Here equality is understood in a relative sense, as importing that, under like circumstances, a like rate, according to weight or bulk, is charged to all persons for the carriage of goods which are of like descriptions for purposes of transportation. *Occasional* inequality, even though *preferential*, is not always *necessarily* unreasonable. But *systematic* relative inequality cannot be reasonable.

The absolute monopoly of such a company, as owner of the road, includes only the profit from *tolls* properly so called.

Any further monopoly is founded only in the great relative necessity, that, for the security of persons and property, a railroad company should have exclusive control of the motive power and of the track.

The monopoly of the company, as a common carrier, depends wholly upon this relative necessity, and cannot be extended beyond its exigency.

But the company may, as a common carrier, exercise any *accessorial* functions profitable to themselves and useful to the public.

Freight which is transportable partly upon their own road, and partly beyond it, can be received by them as consigned for the ulterior destination.

They may, as common carriers, engage in the accessorial business, with horse-power, of collecting freight which is to be transported upon their own railroad, and delivering freight at the places of destination.

But they cannot monopolize wholly or partly this accessorial business, or promote the monopoly of it by any one else, or appropriate *preferential* advantages for conducting it, to their own profit, or to that of any one else.

Express carriers are not, through any present magnitude, or prospective expansion of their business, entitled to any such preferential facilities or accommodations from a railroad company as would preclude or impede participation by the railroad company or by any of the public in conducting such business with equal advantage on any scale great or small.

The charge by a railroad company for such accessorial service with horse-power cannot be imposed upon any of the public who decline to use it.

There is no difference between such a direct overcharge and an indirect one made by refusing abatement from a single aggregate charge which includes it.

Quære, whether a rebate of less than the whole amount or value of the charge for the service dispensed with can be reasonable.

Quære, whether an express carrier who does not himself encroach on rights of the public, and who submits to all necessary and proper regulations of the railroad company, cannot, without obtaining a judgment at law, have relief in equity against such an overcharge.

An express carrier who does not submit or offer to submit, to such regulations, but insists on having preferential accommodations or facilities which could not be allowed without encroachment on rights of the railroad company, and of the public, cannot be relieved before the final hearing.

Quære, whether he can have relief at the final hearing. It seems that he may, in cases in which part of the decree relieving him may be an adjudication against his pretensions which are unfounded.

The charge of a railroad company for transporting packed parcels by rail, of the full sum which would be payable in the aggregate if they were not packed and were charged for severally, cannot be rightfully imposed upon the public generally, or upon express carriers or other middle men.

A court of law and not a court of equity, has primary cognizance of the question of the right of the railroad company carrying packed parcels for a middleman who does not own them to charge him with any addition, however small, to what would otherwise be the regular charge for carrying the package in mass.

The legal right of the railroad company under the last head is not so clearly deniable as to warrant the summary decision of it against them by a court of equity.

A joint stock company was organized under laws of a State, one of which provided that nothing contained in it should be construed to give to such company any rights and privileges as a corporation. The same laws authorized such a company to sue in the name of their president.

Quære, whether such a company was a citizen of that State within the meaning of the 11th section of the judiciary act of September 24, 1789, defining the jurisdiction of the circuit courts.

Upon the application of the complainant in each case for a preliminary injunction, affidavits on his part, and on that of the defendants, were exhibited.

The complainant in the first case, a citizen of the State of New York, had, on August 28, 1872, become the holder of 100 shares of the stock of the defendants.

The complainant in the other case, also a citizen of the State of New York, is president of a joint stock company associated and organized, in pursuance of laws of that State, under the name of "The Adams Express Company," with power to sue in the name of their president. These are ch. 258 of the laws of 1849, and ch. 245 of those of 1854. The latter act provides that nothing contained in it shall be construed to give to such company any rights and privileges as a corporation.

On the part of the defendants it was alleged that the shares of their stock held by the complainant Camblos were acquired by him on account, and in the interest of the Adams Express Company, solely with a view

to enable him to sue here ostensibly as a stockholder of the defendants, but really as an agent of the Adams Express Company, by whom the expenses of the suit in his name were to be borne.

In the following statement of the case, the word complainants, unless otherwise distinctly applied, will be understood as designating the Adams Express Company.

The two bills are precisely alike in their allegations and prayers of relief. They state that from the limitation of the proper business of railroads and other improved highways, under corporate authority, to the routes between their termini and intermediate stations, there has been established for many years past, an extensive independent business known as the *Express business*; that those who conduct it serve the public as common carriers, by gathering small parcels, money and commercial securities at local offices, and the consignors' doors, and delivering them to the consignees' doors, away from the stations on railroads or other great highways, as well as by collecting bills of exchange, notes and commercial paper, and assuming responsibility for the risk of the loss thereof, to their customers; and where railroads exist, conveying the express packages thereon, and principally in the cars of the railroad companies; that the business being principally valuable to the community from the speed with which the packages are forwarded, it has been principally conducted in cars attached to, or forming part of, the passenger trains, as distinguished from the ordinary freight trains of the railroad; that the express business is valuable from the responsibility with which it is conducted, and the facilities it affords; that it required from those establishing it, a large outlay, without immediate remuneration, in acquiring the confidence of the community, and the organization and requisite information of their agents; and that the complainants, for many years past, have thus acquired "an *enormously valuable* express business, extending throughout the country, to the great advantage of the public," conducting it in their own name, and also in that of other private associations, whose interests have been acquired, and some of whose names have been retained by the complainants for their own convenience.

The defendants were incorporated under an act of the Legislature of Pennsylvania of April 4, 1833, with power to make a railroad from Philadelphia to Reading, and with all incidental privileges, franchises and immunities, but none other than such as might be necessary or incident to the making and maintaining of the road, and the conveyance of passengers, and the transportation of the mail, and of goods, etc., thereon. The act gives to the defendants power from time to time to establish and alter or amend rules and regulations for the due ordering of all traveling and transportation upon and for the preservation of the road, and to prescribe the kinds and descriptions of cars, etc., to be used on it, and to regulate speed and transit; provided that the toll on any species of property should not exceed an average of four cents per ton per mile, nor upon each passenger an average of two cents per mile. It was enacted that, after a certain time, an annual report should be made by the company, under one head of which the amounts received for tolls and transportation, and the rates charged, were to be stated.

By subsequent acts of the Legislature, passed in 1837, and 1838, the

defendants were authorized to extend the railroad to Pottsville, with all the privileges granted, and subject to the same restrictions, imposed by the above-mentioned act of April 4, 1883.

An act of April 3, 1862, P. L., p. 234, extended to the defendants the privileges which had been granted to a navigation company by the first section of an act of April 5, 1859 (P. L. 1859, 372), enabling them "to contract for the transportation of coal and other articles upon their navigation, and to and from points beyond the same, and to include the charge for such transportation in their charge for tolls."

The defendants were "operating" their railroad and certain connecting railroads of great extension, when an agreement of August 1, 1866, was made between them and the complainants transacting the express business under one of their own names.

By this agreement, the complainants were, for the carriage of a safe *not exceeding seven cubic feet in capacity*, and other express freight, and the messenger or agent accompanying the same, to have the use, on one of the defendants' passenger trains, of an eight-wheeled car, and, on each of several others of their passenger trains, of a certain fractional part of such a car. There were provisions for the retention by the defendants of the absolute control and regulation of the trains and lines. The weight of the express matter, including the safe and its contents, was not to exceed 12,000 pounds in any one eight-wheeled car, nor more than a proportional weight in any fractional part of such a car. There were various provisions for expediting and facilitating loading, unloading and weighing. Payments were to be made monthly by the complainants of not less than \$400 for the transportation of their messengers and safes, and other freight; and they were, in addition, to pay rates of transportation upon all freight, other than the safes and their contents, greater by twenty-five per cent. than the rates charged, from time to time, by the defendants in their schedules or tariff of freights; provided that the monthly payments should never be less than \$2000, which amount, as a minimum, was to be payable to the defendants whether such rates in addition to the \$400 should equal that sum or not. The complainants were to send a messenger and safe, and to furnish express facilities to the public to the extent to which they could, under this contract, be furnished, at least once a day each way, between designated points. If the defendants should thereafter transport any express matter for others doing an express business, at more favorable rates than those agreed on as above, there was to be a corresponding reduction of the amounts payable by the complainants.

The eighth article of this agreement provided that the defendants should not be, directly or indirectly, liable or responsible to any persons whomsoever, for any loss, or damage, or injury, which might happen to any property of any kind, connected with, belonging to, carried for, or offered to be carried for, the complainants under this contract, or otherwise howsoever, nor for any injury happening to or sustained by any employee, servant, or agent of the complainants, or any persons in any manner connected with them, nor for the death of any such person while upon or about the railroad, or property of the defendants, while upon the business of the complainants, whether such loss or damage, damage to property, injury to, or death of any such person, should have

been occasioned by or through the negligence, or omission, or default of the defendants, their agents, or employees, or other persons, or otherwise howsoever, but from all such loss, injury, or damage, should be by the complainants at all times indemnified; it being distinctly understood and agreed, as part of the consideration of the contract, that the complainants assumed and took upon themselves, and undertook to pay, and provide for, and indemnify the defendants against all and every claim and demand for loss and injury of every nature, to life, person or property, arising from the performance of this contract, or any matter directly or indirectly connected therewith. And the complainants further agreed to indemnify the defendants from all loss or damage, to which they might be subjected for, or on account of any injury to persons or property, caused by or resulting from any explosive combustible, noxious or deleterious substance, transported or held by the defendants for the complainants.

The contract was to continue in force until the expiration of sixty days from the date of the service of written notice by either of the parties, on the other, of their wish, that it should terminate, and was then to become void, etc., except for the enforcement of claims then acquired and existing.

The defendants, in the latter part of 1870, became lessees, for a long term, of all the franchises, railroad and property of the Philadelphia, Germantown and Norristown Railroad Company. This company was incorporated by an act of February 17, 1831, with authority to make the latter road, and to charge and receive tolls, and for freights, in and for the transportation of goods, etc., and for the conveyance of passengers, at prescribed maximum rates; provided that all persons using the road for the transportation of persons or commodities should only use such cars, etc., adapted to the road as the company should prescribe. A supplementary act of April 7, 1832, enabled the latter company to own and place locomotive engines on the road, and transport persons, merchandise, etc., for prices or compensation to be agreed upon.

Since the lease of this road by the defendants, it has been called the Germantown and Norristown *branch* of their railroad.

Under the date of May 7, 1872, it was agreed between the defendants and the complainants, by another of their names, that the defendants should provide for the use of the complainants one eight-wheeled car suitable for the business of an express company, and transport the same daily (Sundays excepted) between Philadelphia and Chestnut Hill, on the Germantown and Norristown branch of the railroad of the defendants, twice each way—attached to passenger trains; and also transport for the complainants one eight-wheeled car (to be provided by the complainants themselves), twice each way daily (Sunday excepted) between Philadelphia and Norristown, on the same branch—attached to passenger trains; and issue passes for the transportation, free of charge, of one employee of the complainants in each of the said cars, upon its two daily round trips. If the defendants should, during the continuance of the agreement, enter into an agreement with any person or persons, in an express business, for the transportation over the said Germantown and Norristown branch, of express matter, upon terms more favorable than were therein contained, the complainants were to have their express

matter transported upon the same terms. In consideration whereof, the complainants agreed to pay to the defendants during the continuance of this agreement, three hundred dollars upon the first of each month; not to make any demand or bring any suit against the defendants, for any loss, injury or damage, from any cause whatever, that might occur to the car furnished by the complainants, or to the goods transported in either of the cars; and to indemnify the defendants from all such demands or suits by any person whatever, and from all demands or suits by reason of any injury to or death of any employee of the complainants; it being the intention and agreement of the parties, that the car furnished by the complainants and the goods contained in either of the cars, as well as the employees of the complainants, should be transported solely at their risk, and without any responsibility whatever on the part of the defendants.

The contract was to continue in force, until the expiration of sixty days from the service of written notice by either party, upon the other, of an intention to determine the same; whereupon it should become void, except for the collection of any sum then due by the complainants to the defendants.

This agreement contained a provision that it was to be deemed and taken to have been in force from April 1, 1871.

On June 19, 1872, the defendants gave to the complainants, under each of the contracts of August 1, 1866, and May 7, 1872, notice that it would become void upon the expiration of sixty days.

The defendants allege that there was no more necessity for the intervention of the complainants in the transportation of express freight and small packages than there would have been for such intervention between the public and the defendants in the transportation of coal or passengers in the freight trains; and that it would not have been just to permit the complainants to continue to carry away a considerable profit which really belonged to the defendants' stockholders.

On August 21, 1872, the defendants gave public notice that on and after September 2, they would take charge of the express business in all its details, on their road, and its branches, and would be fully prepared to accommodate the public in the rapid transmission of money and freight intrusted to their care; adding that direct connections would be made with the "Delaware, Lackawanna and Western Express" for New York city and State, the Eastern States and Canadas, and all points on the Delaware, Lackawanna and Western, Lackawanna and Bloomsburg, and Morris and Essex Railroads, and *at reduced rates*; that particular attention would be given to the collection of checks, drafts, notes, bills, etc., and prompt returns made; that orders for articles to be returned by express would be carried free of charge, and delivered at once upon arrival of trains, and goods called for and returned by next train, if ready for shipment; and that telegrams ordering shipments of packages by express would be forwarded over the lines of the Philadelphia, Reading and Pottsville Telegraph Company at half rates. "For further information" application was to be made at the "General Office" of the "Philadelphia and Reading Railroad Express Department," and at the "Branch Office" of the same department.

The defendants explain their connection, mentioned in this notice, with the Delaware, Lackawanna and Western Express, by stating that it was

to facilitate the transportation of express freight to destinations beyond their own railroads on the customary terms, and that they had offered to transfer, on similar terms, the entire business of such ulterior transportation to the complainants, who had refused the offer.

The complainants received from the defendants, in a letter of August 26, 1872, information that, upon their regular freight trains, they would carry freights for the complainants in the same manner as "for other shippers," that the complainants could not be furnished with separate cars for their goods, nor could the defendants engage to forward them in any given time, but that they should be loaded and despatched in the same order as consignments to all other parties. "Respecting the running of a private car over the Norristown branch," the words of the defendants were: "We are very much cramped for room at our depot, on Ninth street, and we should on that account prefer handling the goods in our own cars. But if you prefer to furnish a car, it can be done, although we shall not be able to promise as good despatch as would be given to our own cars, from the fact that an extra shift will be required, and this could not always be insured in time to get the car out by any particular train."

The complainants inquired generally, and also under specific heads, what facilities would be afforded them for the transportation of their express matter on the *passenger trains* of the defendants over their several roads and the respective branches. The defendants, in two letters of August 30, 1872, answered that if the complainants desired to continue in the express business in the defendants' region, and to make use of the defendants' express department for transportation, the defendants would at all times, be glad to transport any of the express matter of the complainants upon the same terms paid by the public, and would endeavor to attend to the receipt and delivery with promptness, despatch, and in all cases, on terms as favorable as to "any other shipper."

The defendants added: "As we do not intend to set apart in our express cars any particular space for any one shipper, we cannot consent to do so for your company. Neither can we permit your messenger to occupy any space in our express cars.

"As we are obliged to keep up a sufficient equipment to receive from, and deliver to the public, all express matter transported over our lines, we cannot consent to make any abatement to you in consideration of your receiving and delivering goods."

The defendants stated further that it was not their intention to permit the cars of any express company to run with passenger trains.

On September 2, 1872, the defendants commenced, and they have since continued the business of transporting *express matter* in cars of their own, run with their passenger trains, each express car being attended by their messenger in charge of the express matter. For the collection and delivery of such matter at the termini of its lines, the defendants employ horses and wagons.

The defendants collect and transport bank notes, or other moneys in payment of checks, drafts and bills intrusted to them; and for so doing, receive compensation. Their president's affidavit states that "such money or other securities are transported as any other *freight* of similar character and value."

The defendants had "instituted" a tariff of charges to the public for the conveyance of express matter. They refused, as they say, to show this tariff to the complainants, without refusing to make known to them the charge for any particular item of express matter offered for transportation. An interrogatory of the bill asks a disclosure of all the regulations adopted by the defendants for the management of the express business which they have undertaken.

In September, 1872, the relations of the parties becoming practically controversial, several disputes occurred. In what follows, *express freights* will be understood as including all articles or parcels of such small weight and limited bulk that they are, or may be conveniently transportable in fast passenger trains, and all orders and securities for money, and other written or printed papers, of which the transportation otherwise than by mail is not unlawful.

The complainants demanded, as proportional to the magnitude and expansion of their express business, facilities and accommodations, on the scale of those which they had conventionally received from the defendants until the annulment of the contracts of August, 1866, and May, 1872. The defendants objected that certain of the facilities and accommodations thus demanded would be *preferential*, and that the allowance of them would therefore be improper. The questions, under this head, were: whether the complainants could insist on having in a passenger train, a car for their exclusive use, furnished by themselves or provided by the defendants, or on having a sufficient space set apart for such use in a car of the defendants; whether the complainants could rightfully insist upon loading and receiving their express freights upon platforms or landings of the railway depots or stations—at places where the defendants had established offices or warerooms for the reception and delivery of the freights; whether the complainants could insist upon the booking or way-billing, etc., being done by themselves, instead of by the defendants; or whether the complainants could require the admission of an agent or messenger in charge of their express freights, to the car containing such freights, and require his freedom from those restraints upon ordinary passengers which might hinder his personal care of such freights during their transit by rail; and whether, if such an agent or messenger was admitted only as a passenger paying the ordinary fare, he should be allowed as baggage to be carried in the baggage car, a trunk containing express freight of the complainants, without being charged more than for its excess, if any, in weight, above that allowed for an ordinary passenger's baggage, and at the same rate?

The other disputes were upon alleged overcharges by the defendants for the carriage of express freights.

Their charge for the accessorial service with horse-power, in carrying freights to and from the railway, was included in a single aggregate sum, which included also the charge for transportation by rail with steam-power, without any discrimination between the amounts or values of the two services. The complainants themselves bringing the freights to, and receiving them at the railway, and thus making no use whatever of the horse-power of the defendants, objected to the charge for its use, offering to pay the amount which would have been chargeable for the transportation by rail, according to the rates which had been usual until

the defendants engaged in the accessorial business. This the defendants refused to accept. They exacted the aggregate sum, without making any abatement whatever. The complainants paid the whole charge under protest. As to the excess, it was contended for the defendants that no rebate whatever was requirable of them, and by the complainants that no rebate less than of the whole excess above the proper charge for transportation by steam upon the rails could be reasonable.

Another dispute arose thus. When several articles or parcels, all receivable at the same place of destination by the complainants, but there deliverable by them to several persons unknown to the defendants, were so bound or enclosed as to form together a single package not of inconvenient bulk or weight for transportation, the complainants required the defendants to receive such package for transportation upon their road at a rate of charge no higher than if the whole contents were owned by the complainants, or were intended for ultimate delivery to a single person. The defendants refused to carry the package at this rate, exacting the full aggregate amount which would have been chargeable if the several parcels had not been packed together. The whole charge was paid by the complainants, under protest as to the excess. Between the two extremes of the question as to packed parcels, a point argued was whether, if the whole additional charge was excessive and unreasonable, a less addition might not be properly made in order to cover the contingent risk of the defendants' liability to several actions at the suit of the unknown parties interested.

The complainants do not appear to have brought any action at law to get back either of the two excesses in amount which they paid under protest.

Besides the special contestations which have been mentioned, the complainants contended generally that carriage without steam-power to or from the railway is a business wholly distinct from that of carriage by rail; that the charter of the defendants does not authorize them to engage in any other business of carriage than upon the rails, and moreover does not authorize them to receive any freight which is transportable upon their own road and beyond it, as consigned for the ulterior destination.

The purposes of the bills were threefold:

First, by injunction, to prevent the defendants from continuing the competing business with horse-power.

Secondly, to compel by mandatory injunction, or decretal order, the allowance by the defendants to the complainants of the disputed facilities and accommodations.

Thirdly, to prevent by injunction the continuance of the alleged overcharges.

The defendants denying wholly that the complainants' case had any merits, objected that the questions in dispute were primarily cognizable, not in equity but at law, and if this were otherwise, could not be properly considered until the final hearing; that the complainants could not sue as a citizen of the State of New York, under the 11th section of the judiciary act of 24th September, 1789, and could not sue in equity out of that State, in the name of their president.

Opinion delivered April 25, by

McKENNAN, C. J.—The prayers of these bills are the same. Although, in form, they invoke the preventive intervention of the court, they are founded upon the alleged denial of certain legal rights claimed by the Adams Express Company, and it is manifest that the only beneficial measure of relief would be a mandatory order, constraining the defendant to concede to the express company the exercise and enjoyment of the rights claimed by it. This it may be within the range of the power of the court to decree, but it ought to be done only under circumstances of special exigency, to avert the continuing injuriousness of clearly wrongful acts. As a method of enforcing the concession of a mere right, it is inconsistent with the object and appropriate functions of a preliminary injunction.

In *The Lehigh Coal and Navigation Co. vs. The Lehigh Valley Railroad Co.*, referred to in *Audenried vs. Phila. and Reading Railroad Co.*, 18 P. F. Smith, 376, Mr. Justice Strong said: "A preliminary injunction ought never to be granted except in a clear case, and then only to prevent a substantial injury. Its purpose is to keep things in their existing condition until the case can be finally heard. As it is the strong arm of the law, it must be used only when necessity requires it. *And a preliminary injunction can never be necessary when the thing sought to be restrained has been already done; for its province is not to undo, but to prevent and preserve.*" And in *Farmers' Railroad Co. vs. Reno Oil Creek and Pithole Railroad Co.*, 3 P. F. Smith, 224, the same learned judge said: "The sole object of such an order is to preserve the subject of the controversy in the condition in which it is when the order is made. It cannot be used to take property out of the possession of one party and put it into the possession of the other. That can be accomplished only by a final decree."

It is true the allowance of mandatory interlocutory injunctions has, to some extent, the sanction of the modern English practice. It has grown up upon the supposed authority of Lord Eldon, who made such an order for the first time, in *Lane vs. Newdigate*, 10 Ves. 193. But he evidently regarded it as exceptional, and while he considered the injury complained of as a clear invasion of the complainant's rights, demanding prompt reparation, he declined to decree a specific correction of it by the defendant, but so avowedly framed his order as to "create the necessity" for the defendant doing what he was unwilling to order him directly to do. Such a case cannot be regarded as evidence of the existence of a uniform practice, or as a warrant for the establishment of one. It has certainly not led to such a result in this country, for in *Audenried vs. Phila. and Reading Railroad Co.*, *supra*, Mr. Justice Sharswood says, with great force: "There are some few instances in England in which a mandatory order has been made in an interlocutory application, but they have been very extreme cases, and ought not to be followed as precedents."

Is there anything, then, in the circumstances of the present case, to demand a resort to so questionable a mode of interposition?

The Adams Express Company is entitled to protection only against such illegal acts of the defendant as are prejudicial to its rights and interests. If the railroad company has assumed the exercise of any franchise not conferred by its charter, the express company is not authorized to call it to account. If, without right, it seeks to appro-

prate the profits of a business of which the express company before had the monopoly, it does not thereby incur any liability to the express company. Their relations to each other grew out of the corporate duties of the defendant as a common carrier, and it is only for a failure or refusal to perform any of these duties to the express company as a shipper that the latter has a right to complain.

The transportation of its freight over the defendant's road is not denied to the express company, nor can it be. The parties disagree as to the regulations imposed and the rates demanded by the defendant. The right to a rebate from the charges of the defendant, equal to the cost of collecting, transporting and delivering parcels from and to the doors of the consignors and consignees, and the right to pay for transporting a package of parcels only the price charged for a separate one, are claimed by the plaintiff, and constitute the substantial subjects of the contention. Practically, only the profits to be derived from the express business on the Philadelphia and Reading railroad are involved in it. Shall these profits accrue to the railroad company or to the express company?

Are these questions of such urgent significance as to call for their decision before a final hearing? To decide them now, as must necessarily be done if the present motion is allowed, is, in effect, to decide them finally, because a final decree could not more fully secure to the plaintiff the enjoyment of what it claims than would an interlocutory injunction. Why should this be done in the absence of an answer and of the proofs necessary to a precise adjustment of the relative rights and duties of the parties, or without a trial at law? "To preserve the subject of the controversy in the condition in which it is" now, does not require it, but the effect would be to undo what has been done, to take away from the defendants the controverted rights now enjoyed by them and confer them upon the plaintiff. This can be accomplished appropriately only by a final decree.

Nor has the complainant, Camblos, any better title to this summary relief than the express company. As a stockholder in the corporation defendant, his only interest is in being protected against the risk of loss. So long as those who manage the corporation keep within the limits of its charter, and commit, or propose to commit, no breach of their trust, he has no right to complain. In *Dodge vs. Woolsey*, 18 How. 341, the court says: "It is now no longer doubted, either in England or the United States, that courts of equity in both have jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction to restrain those who administer them from doing acts which would amount to a violation of charter, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchise if the acts intended to be done create what is, in the law, denominated a breach of trust." If the acts complained of are violations of the defendant's charter, as they are not because concerning only the administration of its legal faculties, the mischief has been already done, and a preliminary injunction could not avert their injurious consequences; and surely the value of the complainant's stock will not be impaired, or the dividends upon it lessened by securing its participation in the profit of a business

which he seeks to divert into another channel. And then as to the apprehended liability of the defendants to the express company for damages, he has voluntarily sought the risk from which he asks to be protected. It is charged and not denied that he acquired his stock "on account and in the interest of the Adams Express Company, and solely with a view of giving himself a supposed status in court, to enable him to maintain the present suit ostensibly as a stockholder of the Philadelphia and Reading Railroad Company, but really as an agent of the Adams Express Company," and "that the expenses of the said suit are to be borne by the said company." And these averments are corroborated by the fact that his bill is filed at the same time with and is an exact counterpart of the express company's bill. He does not, therefore, come into court with a *bona fide* complaint as a stockholder really seeking protection, but as the auxiliary of another party whose proceeding is adverse to his interest as a stockholder. It is not a question of his motives, but of the genuineness of the character in which he presents himself, and of the good faith of his appeal for summary relief. A court of equity is not the redresser of simulated wrongs, nor will it exert its strong arm to relieve a complainant in a position which he has voluntarily assumed, with a full knowledge of its perils.

The motion for a preliminary injunction is, therefore, denied.

Opinion delivered by

CADWALADER, D. J.—I concur in the opinion of the circuit judge, and in his reasons. We have arrived at the same conclusion by processes of reasoning perfectly consistent, though not alike. His opinion, as delivered, is almost independently of any question upon the merits, confined to that of remedy in the present stage of the cause. My opinion was formed upon a consideration of the merits of the whole controversy, reducing the numerous questions to two, and even dividing each of them, so as to leave only one point under each open to future doubt.

I was thus able to limit the question which the circuit judge has considered at large, to these two points. But it was therefore necessary to form an opinion upon most of the other questions. This was done without any opportunity of consultation with him, until the present term. Either method of considering the case was proper. It had been very fully argued, and nothing could be added to the printed briefs of counsel. But if the circuit judge had either differed, or doubted, as to any part of my opinion, I would not have delivered it. He, however, concurs on every point; and is desirous that it should be considered as the opinion of both judges.

The case at the suit of the express company will be properly considered before any distinct consideration of the stockholders' bill. But certain points of argument which are more or less common to the two cases will, in considering the former one, be noticed somewhat more fully than might be necessary if it were alone before the court. Any question of supposed liability of the charter of the defendants to forfeiture, belongs only to the case under the stockholders' bill, as the circuit judge has clearly shown. But the interpretation and effect of the charter, upon which such a question depends, may also ascertain relations of the defendants either to the public generally, or to certain freighters, upon questions belonging peculiarly to the other case.

Each party imputes, with apparent reason, to the opposing litigant, a purpose to monopolize the transportation by horse-power, of light freights of small bulk to and from the railroad of the defendants. With permission of the circuit judge, I quote him as having, in consultation, said of the case, that it is a war of monopolists.

There is unlimited legislative power to create such a monopoly. (6 Wharton, 46; 12 Harris, 382; 1 Wallace, 145-6; 3 Wallace, 81, 213; *Slaughter House Company's case*, Supreme Court of the United States, 14th of April, 1873, affirming 22 Louis; An. 546; and see 2 Gray, 1.) Any exclusive profit granted by the State, either to an individual, or to a corporation, is a monopoly in the general sense of the word.

In former times it was ordinarily understood as an exclusive profit for which the public received no equivalent benefit. Such a monopoly, though against public policy, and odious, can be legislatively granted in most States of the Union. But in our day, a wiser policy and a decent regard for public interests, and for public opinion, prevent any direct and avowed establishment of monopolies of this kind.

Existing railroads are not monopolies in any such sense. The efficiency of the locomotive steam engine for enlarged purposes of transportation upon a fixed metallic rail, was not completely established until the latter part of 1829. The public benefit then expected from a railroad was the substitution of the power of steam for that of horses, in transportation upon land between distinct places.

It was known that the production of this result would require immense expenditures. But the capital invested in the construction of railroads, and in their equipment, exceeded by almost countless millions, what was at first expected. Nevertheless, wherever the roads have been completed, even where the private contributors have received no remuneration for their outlay, the public benefit has been great; and where the private remuneration has been greatest, it is but small in proportion to the beneficial results to the public attained, and in prospect. These results exceed immeasurably the most sanguine former hopes. In all directions, a force equal to that of millions of the strongest horses, working by night and by day, and consuming no food, has, on both sides of the Atlantic, been made available for quick transportation. The consequent increase of wealth at the ends of the lines was, in part, predicted. But the almost unforeseen production which railroads generate along their borders will soon exceed, where it may not already surpass, or equal, that upon the shores of great navigable rivers.

The ordinary modern practical use of the word monopoly is in the sense of an exclusive profit, for the grant of which by the State the public are intended to receive equivalent benefit. In what follows, the word, unless otherwise qualified or explained, will be so understood. It has been said that every grant of a corporate franchise or privilege may, so far as it extends, be called a monopoly. The word will not, however, be used in so vague a sense. It will be understood as applicable to those privileges only with which there is no present available competition.

The legislative charters of some of the railroad companies created soon after 1829 contained express provisions of different kinds against the making, during a limited period, of a railroad by any one else within a defined area. The legislature could not afterwards, with constitutional

effect, sanction the establishment of such a competing road without providing for the payment of compensation for the loss or diminution of the monopoly, after a proper ascertainment of the amount. (6 How. 507; 13 How. 82, 83; 11 Wright, 325, 329; 2 Gray, 1, 42; 3 Wallace, 52; Redfield, § 70, 4th ed., vol. 1, pp. 257-8.) It is believed that in Pennsylvania, and in most of the States, no such improvident legislation is now in force. Where it is not, the legislature, not having disabled itself, is under no such constitutional restraint; but may authorize the unconditional construction of new railroads, however near they may be to existing lines. The justice and wisdom of such legislation depend upon relative considerations, which may vary as increase of wealth and population diminish the area of a reasonable monopoly. The question may likewise be affected more or less by lapse of time. To authorize the construction of a new railroad very near to a rail recently laid might be manifestly unjust and impolitic. (7 Harris, 216, 217.) But when a change of local circumstances creates a public want of a neighboring line which can be profitably used, it would be anomalous that the existence of the former public highway should indefinitely prevent the construction of the new one. The loss total or partial of the profits of the former one from consequences of such local change was a contingency to which its owners were always liable. We see this contingency on a large scale in existing and projected railways to the Pacific. The unlimited legislative power over the subject is unquestionable. The construction of a new road, without any compensation to the owners of the former one, may be constitutionally authorized with no legislative motive except the encouragement of competition. (11 Pet. 544; 23 How. 437; 3 Wallace, 213; Redfield, § 251, 4th ed., vol. 2, p. 408. See 12 C. B. N. S. 58-63, and Mr. Dickson's note.) But, though routes the most proper for competition were legislatively established, effective competition might be long postponed through the facilities which connections by intervening railroads afford for conventional arrangements between companies intended to have been competitors, and for consolidations merges, and so called amalgamations of companies, and also for purchases or leases of a company's road and franchises by another company, etc. (See 9 Casey, 281-288; 5 Wright, 447; 3 P. F. Sm. 9, 19, 20, 59; also Shelford, Glen's Ed., Intr. xlviii., xlix.) As yet, few, if any, truly competing lines exist. Even between Philadelphia and New York, the routes are still so controlled as to preclude competition. The question of monopoly therefore continues to be all important. There is, or was lately, from Paris to Bordeaux, but one railroad. The road itself is therefore in France, considered in some sort, a monopoly. (*Duverdy Contr. de Transport*, §§ 162, 159, pp. 239, 236, and Intr. p. 10.) So the defendants have now the only existing railroad from Philadelphia to Pottsville, and the only connection by rail with many other great routes. The business of the road must therefore necessarily be, in some respects, monopolized by the defendants now; and whatever may be the future effect of possible competition, it cannot wholly deprive them of certain exclusive profits. (See 1 Q. B. 584; 4 Q. B. 36, 37.)

The company, as owner of the road, has thus a legitimate monopoly of the rates chargeable for the use by others of the track itself, as a public highway. These rates, and nothing else, are, in a strictly proper sense, called

tolls. (4 P. F. Sm. 315; 15 P. F. Sm. 210; 1 Q. B. 575-577; 9 Exch. 642.) If railroad companies did not furnish any motive power, and were not in anywise carriers, their only gross profits would be *tolls* thus properly defined; and the companies would have a monopoly of them.

The earlier legislative charters of railroad companies after 1829 were not alike. Some of them indicate that the companies were not expected to engage at all in the business of transportation. But most of the charters, even of that period, import that the respective companies were expected to become carriers on their own roads, though not to monopolize the business. The Supreme Court of Pennsylvania have called the former simply railroad companies, and the latter both *railroad* and *transportation* companies. The latter, as railroad companies, have "power to construct and maintain" the roads, "and to charge and receive tolls from those" who may "transport either merchandise or passengers over" them; and, as transportation companies, have authority "to transport either passengers, or the property of others, over their own roads, in their own cars, and with their own motive power." 4 P. F. Sm. 312; see 12 P. F. Sm. 228, 229.

The same court has, in construing the charter of the defendants, decided that they are, by necessary implication, if not through express enactment, a transportation company, as well as a railroad company: in other words, have the twofold franchise of taking tolls, and also engaging in the business of carriers upon their own road. (*Ibid.*) Thus the charter, though its effect is to give a monopoly of tolls, confers no monopoly of the business of carriers. Yet the defendants have a *practical* monopoly of the business of carriers *upon their own rails*. This will require explanation.

Until 1829, horse-power alone had been used upon railroads. An English railway, or tram-road, had been made by laying iron or wooden pieces in two parallel lines for the wheels, without levelling the track by cuttings or embankments more than by the grading of a turnpike road. Most of these former railways or tram-roads were private ways. But some of them were public highways. (See 2 B. & Ald. 646; Shelford, Glen's Ed., Intr. pp. xxvii., xxviii.) From a supposed analogy to them, the original notion as to a railroad, fitted for the use of a locomotive steam engine, was that any one of the public might, under proper conditions and regulations, use his own locomotive engine with its train upon the fixed rail, in like manner as a boat upon a canal, or a vehicle upon a turnpike, paying in like manner a fixed or a reasonable toll. The Versailles railroad, on the left bank of the Seine, seems to have been thus used, for a time, to a limited extent (Duverdy, § 160, note, p. 237); and in England, the Grand Junction Railway was, at one time, and possibly may still be, to a small extent, so used. (See 4 Q. B. 20, Shelford, Glen's Ed., vol. 1. p. 507.) The rail may still be thus used by the engines and trains of connecting railroads paying toll or an equivalent compensation. (See 4 Q. B. 19, 20, 21, 22, 37, 38; 9 Exch. 642; Law Rep. 2 Q. B. 251.) But except for purposes of connecting railways, this use of the track by others than the company owning the road is very little, if at all, practised in Europe, and is in the United States, almost, if not quite, unknown. (Redfield, § 124, 4th ed., vol. 1, p. 446.)

This tacit exclusion of the public from participating in the business of

transportation by rail, resulted from what was almost absolute necessity. Under the present system of transportation upon a railroad, such are the dangers from the moving fires, from the intensity of the pressure of steam, and the frequent insecurity of boilers, from the great velocity of the trains, their extended length and immense weight, and the inability to deviate from the track, that a divided control of the locomotive power was very soon found inadmissible. It thus became impossible for the public generally to use locomotive engines upon the lines, and impossible to use cars of any kind independently of the most rigid supervision and regulation by the railroad companies. (See Shelford, Glen's Ed., vol. 1, Intr. pp. xxix., xxx.) If dangerous interference with the police of the roads could have been avoided, the subjection was greater than could be submitted to by independent carriers. Through this relative necessity, the business of carriers by rail was everywhere monopolized by railroad companies.

The origin of the enlarged monopoly was thus explained in a very instructive argument in 1842, by Mr. Martin, afterwards a baron of the Exchequer. (10 M. & W. 412, 413.) It had before been, and was afterwards, judicially so explained by Lord Denman. (1 Q. B. 558, 580; 4 Q. B. 18.) The companies were indirectly fortified in the monopoly through their exclusive or preferential use of their depots or stations, and their warehouses, platforms, etc., and the immediate approaches or outlets. The appropriation of some of these preferential facilities to their own exclusive benefit has not been judicially considered wrongful. Whether it may not be such as to encroach, in some degree, on rights of the public, is a question which there is no occasion to consider now, because the companies would, independently of such advantages, have a practical present monopoly of the business of carriers upon the rails. Lord Denman said that "the supposition of a free competition of carriers on the same railway is practically little less than absurd," and that "if all difficulties were removed as to the stations, warehouses, landing places and approaches, and all these were supposed as much laid open to the public as the railway itself, the very nature of the mode of conveyance forbids a free competition of rival carriers." (1 Q. B. 579.) "It would," he added, "be no answer to say that, by law, the railway is a highway, that all the world may carry goods and passengers on it, that it is an accident that the company alone monopolize all the trade, and that their monopoly may cease to-morrow." (1 Q. B. p. 584; see also 5 C. B. N. S. 351.)

A recent observation of the Supreme Court of Illinois, that a railroad company is chartered *solely* for the purpose of exercising the functions and performing the duties of a common carrier (February 22, 1873, *Chicago and Alton Railroad Company vs. R. R. etc.*, Comrs., Chicago Leg. News, March 1, 1873, vol. 5, pp. 266, 267; Phil. Leg. Gaz., March 14, 1873), is thus, to practical intents, true.

If tolls, distinctively so called, were alone in question, and if the rates of toll were neither prescribed nor limited by the legislature, the companies could not charge unreasonable rates. But this proposition is practically merged in the question of the charges which the companies may make as common carriers.

The general railroad law of Pennsylvania gives to the respective com-

panies to which it applies exclusive control of the motive power; and enables them to include in a single charge both tolls and a compensation for the use of the motive power when the cars to be transported are owned or furnished by others. This enactment does not, where the company themselves are carriers, regulate the charge of the freight money. (Act 19th of Feb., 1849, § 18.)

This general law does not apply to the present defendants. With reference to their charter, the Supreme Court of the State has discriminated further, distinguishing tolls defined strictly from charges for use of the locomotive power, and distinguishing both of those charges from charges of passenger money and of freight money. (4 P. F. Sm. 314, 315; 15 P. F. Sm. 210; 12 P. F. Sm. 228, 229.)

Every charge by a railroad company, as a *carrier*, upon the *line of the road itself*, is thus composed of three values. One of them is the amount which would be chargeable simply as toll, if the company neither furnished motive power nor were carriers. Another is the additional charge which they might make for the use of the motive power if they were not carriers. The other may be distinctively called freight-money. It is the additional amount which is chargeable because they are the carriers. These three values may be reducible to two by including the charge for use of the motive power under the head of toll. The two values will then be those of toll and freight-money. American, French and English legislation contains careful provisions for analyzing the sum charged in tariffs, or in reports made annually, under these two heads, though not under precisely these names. The statistics of the analysis, of which the memorials are thus preserved, may be useful, not only in defining present relations between the companies and the public, but also in the contingency of such future improvement in the method of transportation as may open it to the public.

In external relations of the companies, a single charge alone occurs. (See 1 Q. B. 575-6.) It has, perhaps, oftener been called a toll than by any other name. The designation, as we have seen, is not precisely accurate. But it would seem at first view to be of little or no importance whether the charge were called a toll, and was understood as including the value of the freight-money, or were called freight-money or *fare*, and was understood as including the toll. The verbal distinction has consequently been disregarded more or less everywhere, and occasionally even in Pennsylvania, where it has been best explained. In England, confusion and uncertainty have arisen from a lax use of the word tolls, in both legislative and judicial phraseology. It is to be regretted that the courts have not confined their application of the word tolls to charges for simple passage over the road. But, as we have already seen, such tolls are not now, in practice, chargeable except for the reciprocal use of connecting railroads; and even as to them, a conventional commutation is probably made wherever it is authorized by the respective charters.

The objection to extending the application of the word toll with undue latitude is that it tends to exaggerate the mental conception of a railroad company's monopoly. Of tolls properly so called, the monopoly is an essential right of the company as proprietor of the road. The monopoly of the carrying business originates, on the contrary, in the

relative necessity which has been described. In the former monopoly, the proprietary right is moral as well as legal. In the latter monopoly, there is neither proprietary nor essential moral right; and the legal right is coextensive only with the necessity in which it originates. The extension of the claim of moral right beyond its just limit in this respect may have been the cause of otherwise inexplicable renewals of contestations by English railroad companies on points already litigated and judicially decided against them, and of the frequent new phases of the argument of old questions.

It may be suggested that this reasoning is too analytical, that the service of a railroad company as carrier is a single one, that the pecuniary consideration for it includes inseparably the profit in which the monopoly is rightful, and that it cannot be less rightful merely because an admitted necessity enlarges the service performed, and proportionally enlarges the pecuniary consideration.

The suggestions might, perhaps, prevail if transportation upon the line of rails were alone in question. But the present controversy concerns accessorial carriage by horse power off the line of the railroad. Conceding the rightfulness of such accessorial business beyond the rails, there can be no reason that it should be monopolized. It is conducted where tolls cannot be taken, and where steam power is not used. (See 5 C. B. N. S. 362, 363, 355, 669, 679.)

In England, Chief Justice Erle stood almost alone in the opinion that a railroad company, in recompense for their outlay, and of the fulfilment of the purpose of their incorporation, had both a legal and a moral right of monopolizing, not only the carriage of goods upon the line of the road itself, but also the accessorial carriage performable off the line with horse power. To this opinion, though always a dissenting one, he adhered with tenacity from 1861 to 1869. He had expressed it at *Nisi Prius* in 1854, when a verdict conformable to it, found under his direction, was set aside. (9 Exch. 559. See 11 Exch. 742.) It was opposed to prior decisions; but his dissent from them caused, in subsequent cases, a revision of the subject in the Exchequer Chamber and in the House of Lords, in which tribunals the prior decisions could not prevent the consideration of the question upon original grounds. On the fullest consideration his opinion was definitively rejected. (16 C. B. N. S. 137, affirming 14 C. B. N. S. 1, and acc. with 5 C. B. N. S. 336; Law Rep. 4 H. L. 226, affirming 3 H. & C. 800.)

Here, however, the complainants object earnestly, not only to the *monopoly* of such accessorial business by the defendants, but even to their engaging or participating in the business at all.

The consideration of this objection may be prefaced by another inquiry, which has been suggested in the argument. It is whether the defendants can, as carriers by rail, transport goods which are destined beyond the termination of their own road. This inquiry is not whether the responsibility of such carriers by rail continues until the goods reach the ulterior destination. It is not an inquiry what engagements may be made, or implied, as to putting the goods in the due course of transmission to such destination. The inquiry is whether such carriers must refuse to transport goods on their own route merely because they are to be carried farther, and whether they may not, on the contrary, solicit such custom in order to increase the profitableness of their business.

From time immemorial, the service of a common carrier to the public has included the transportation of matter destined beyond his route, and has included the affording of necessary and proper facilities for the ulterior transmission. Great public inconvenience would result if railroad companies could not afford such facilities in this respect as other carriers. The act of Congress of 15th of June, 1866, purports to authorize every railroad company in the United States whose road is operated by steam to carry, upon and over the road, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination. This act provides that it shall not be construed to authorize any railroad company to make any new road, or connection with any other road, without authority from the State in which such railroad or connection may be proposed. The Pennsylvania statutes prior to 1866, which were fully reviewed in the cases reported in 3 P. F. Sm. 10, 20, and 62, and the subsequent acts of 4th of April, 1868, 17th of February, 1870, and 26th of April, 1870, have established an extended system of direct and indirect connection of railroads within and without the State, and authorized their merger consolidation and lease for the further extension of continuous routes. Whether these laws apply directly to the question or not, their purposes would be materially frustrated if the companies could not take freights with unlimited ulterior destinations. But in the absence of all such legislation (and without any special reference to the enactment of 3d of April, 1862, which, read in connection with an act of 5th of April, 1859, authorizes the defendants to contract for transporting freights to and from points beyond their line), the question would be attended with no difficulty. It has been judicially conceded, assumed or decided in Pennsylvania, in many of the other States, and in England, that a railroad company may, as a carrier, receive goods which are to be transported beyond the end of the company's own route, whether the destination is within or without the State or country, or is beyond seas. (6 Harris, 224; 9 Wright, 208; 10 Wright, 211; 11 Wright, 338; 4 P. F. Sm. 77, 83; 18 P. F. Sm. 277; 11 P. F. Sm. 85; 7 H. L. 194; 12 C. B. N. S. 63; 10 C. B. N. S. 675; 2 H. & N. 709; Law Rep. 1 C. P. 336; Law Rep. 1 Exch. 147, 148; 8 M. & W. 427; Redfield, secs. 180, 181, 4th Ed., vol. 2, pp. 112, 123.)

This question has been considered more fully than would otherwise have been thought necessary in consequence of a remark of Chief Justice Redfield, upon a case in Connecticut (22 Conn. 502), that if the matter were altogether new there might be some doubt (Redfield, *ubi supra*).

The question, if it can be called one, having been disposed of, we may consider the objection that the defendants cannot, as carriers, use horse power for accessorial business performed off the rails in collecting freights at the doors of consignors and in making deliveries at the doors of consignees. We have seen that the defendants cannot monopolize the business. Whether they can participate in it is the very different present question.

The question is not novel except in the physical proportions of the subjects of it. The scale of all the business of a railroad company is

thus enlarged. The passenger car in the United States, if not in Europe, is the improved and enlarged substitute for the stage-coach or diligence of other days. In the freight trains, whose burden car is the substitute for the former great wagons, loads are now measured by the ton. The drayage and slow cartage to and from the rails are facilitated by turn-outs on rails, and by lateral railways. There is, perhaps, no proportional change greater than that in the measure of such light freights of small bulk as are conveniently transportable with speed, and are usually carried in the passenger trains. In the United States, these freights were formerly and are still called *express matter*. Although the demand for the labor of horses in Europe and America continually increases, their aggregate strength is now less than sufficient for those purposes, incidental or auxiliary to transportation, for which the strength of men formerly sufficed. Portable articles were formerly understood as those which could be conveniently carried by hand, or, at most, in a push-cart or wheel-barrow. Of their increase in bulk, we may form some estimate from the former contract of 1866 between the present litigants, allotting whole cars, and fractional parts of cars, for such matter, and allowing seven cubic feet for the capacity of a strong box or safe. Of the increase in weight, an estimate may be conceived from English statutes allowing additional proportionate amounts of charge for the transportation of light matter of different kinds, describing it as of the respective weights of 100 pounds and 500 pounds. Independently of such enlargement in bulk and weight, the number of parcels or articles of this kind so accumulates for transportation by rail that they could not be collected and carried to railway depots and stations, or properly carried from them for individual delivery, without the use of suitable vehicles drawn by horses. These vehicles comparatively light with certain relations, are with others comparatively heavy. They are not less necessarily incidental and auxiliary to the transportation of express matter by rail than the wheelbarrow, with its porter, was formerly the incident or auxiliary of transportation by wagon or stage-coach. (See 5 D. & E. 396, 397.)

For the transportation by rail of express matter, and its incidental collection and delivery, economical and profitable arrangements have not been as yet systematized. The reason appears to be that the profits from the carriage of such matter on the rails are very small as compared with those of the accessorial business in which horse-power is used. An allegation of the complainant's bill, supported by an affidavit, is that this accessorial business, which they have heretofore conducted, is "enormously valuable." But from the statistics in reports of railroad companies to their stockholders, their own profits under this head seem to bear a very small proportion to those derived from carrying heavy freights.

There is no allegation that the charges to the public of those heretofore engaged in the express business have been reasonable.

As the railroad companies cannot themselves monopolize this accessorial business it would be prejudicial to the public interest that they should be excluded from participating in it. Their participation may be the only means of preventing outside combinations to maintain high charges. If direct participation were impossible, the inducements to encourage outside monopolies would be dangerous to the public interest.

Of this and analogous dangers, many examples on both sides of the Atlantic are found in books of reports. But the number of such examples may be small in proportion to that of cases unknown.

The first argument in support of the objection is that the legislative charters of railroad companies are construed strictly against the companies, and that their franchise of common carriers on the line of a railroad therefore cannot be extended by implication so as to include any transportation which is not *upon the rails*.

The charters of railroad and other public improvement companies are judicially designated as contracts between the respective companies and the State or the public. The expression contract, or bargain, after having been thus applied by Lords Ellenborough, Eldon and Tenterden, and by other eminent judges in England, was judicially criticised there, because it might, unless explained, be understood as importing that the charters were *executory* contracts of the companies *enforceable by mandamus*. These companies are under no compulsory obligation to begin the projected improvements, or to complete them if begun. (1 El. & Bl. 858, 874; Redfield, sec. 162, (n) 4th ed., vol. 1, pp. 630, 632-5.) After their completion moreover, the companies have an option to omit, or defer, and to intermit and resume the exercise of corporate functions of certain kinds. Nevertheless the charters are properly called contracts. They are at first conditional or executory, and may afterwards become executed contracts. The English criticism admits this. (Compare 1 M. & K. 162, with 2 Younge & C. Exch. 618; and 1 El. & Bl. 868, 869.) But if it did not, it could have no effect in the United States, except, perhaps, to qualify the use of the word contract, not inconsistently with its application originally intended. An executed contract has its obligatory effect. The observation is important, because the constitution provides that no State shall pass any law impairing the obligation of contracts. This prohibition extends to all contracts executed or executory, whether between individuals, or between a State and individuals. The Supreme Court, adopting the suggestion of Blackstone (Com. II. 443) that an executed contract differs nothing from a grant, have considered a legislative grant a contract on the part of the State. (6 Cr. 136, 137.) All State laws incorporating private associations for public purposes are thus legislative grants, and as such are contracts. (4 Wheaton, 636-650; 8 Wheaton, 92; 4 Peters, 560; 1 Black. 436; 4 Wallace, 549, 550; 10 Wallace, 515; 8 Wallace, 436, 437; 1 Wallace, 145, 146; 3 Wallace, 73; 13 Wallace, 212-214, 218, 266-8.) Public interests may afterwards require legislative abrogation, resumption, alteration or transfer of the corporate franchises. But, unless the original acts of incorporation have reserved the right of such repeal, or change, it cannot, without the consent of the respective companies, be effected constitutionally, except through laws providing for the payment of pecuniary compensation after proper judicial ascertainment of the amount. (6 How. 507; 13 How. 82, 83; 16 How. 369; 11 Wright, 325, 329; 2 Gray, 1, 42, and other cases above cited; also Redfield, sec. 70, 4th ed., vol. 1, pp. 257-8.)

These are now constitutional truisms. Not less trite is the remark, that in England where legislative omnipotence prevents corporate franchises from being thus irrevocable, yet, however, improvidently they may

have been granted, moral considerations generally suffice to protect them against legislative encroachment without compensation. Therefore, on both sides of the Atlantic, there is like moral reason for a strict construction of such charters, though the legal reasons may be more obligatory in the United States.

The reasons of policy or justice ordinarily given for such a construction are that the administration of a franchise of great public interest by a private person, or private association, is against common right, and that the charters are penned by or for the private persons to whom they are granted.

Chief Justice Redfield observes truly that there is no necessity that the public functions in question should be confined to aggregate corporations. He says, that the same franchises and immunities might be conferred by the legislature upon any private person, and that, whoever was the grantee, whether a natural person or a corporation, the same rights, duties and liabilities would result from the grant. (On Railroads, sec. 17, 4th ed., vol. 1, p. 52, note 4.) It may be added, however, that the franchises might exist without the immunities. The universal practice, Chief Justice Redfield says, confines the public functions to corporations aggregate. (Ibid.) It adds force to the reasons for a strict construction of the charters that they in effect exempt the members of these private associations from individual responsibility.

The rule of strict construction generally prevents the implication of any corporate privilege not expressly granted. The acts incorporating the Chesapeake and Delaware Canal Company furnish an example. They authorize the charge of certain tolls for commodities in vessels passing through the canal, and for empty vessels except such as return empty after payment of a certain toll. As no power is given to take toll from passengers, or from a vessel on account of passengers on board, a vessel with passengers can, *as to them*, navigate this canal free of toll. (9 How. 172.) So the Stourbridge canal in England was formed upon two levels which were connected by locks. The proprietors of the canal were incorporated by an act authorizing them to take tolls for articles passing through any one or more of the locks. The English decision (2 Barnw. & Ad. 792), that this gave no right to toll from those who navigated one of the levels, without passing through a lock, has been generally approved in the United States. (11 Peters, 544, and cases next below cited.)

The rule of strict construction applies likewise where the words used would otherwise admit of different meanings, one of which would abrogate, restrict or abridge independent rights, profits or facilities of the public. Where the words are thus ambiguous, the meaning most favorable to the interest of the public and most adverse to that of the company should be adopted, because the company "in bargaining with the public" ought to take care to express distinctly what is intended. (See the books above cited and 11 East, 685; 23 How. 88; 2 M. & G. 164, 165; 1 Black. 380; 2 Jo. 320, 321; 7 Harris, 218; 3 Casey, 339, 351; 8 How. 581; 2 P. F. Sm. 516, 517; 9 Harris, 22; 4 Bingh. 452, 453; 1 Q. B. 588; 3 DeG. F. & J. 361.) A peculiar case, often cited, by mistake, as a leading one under this head, was that of the *Glamorgan-shire Canal Company*. The canal obtained its principal supply of water

from the river Taaffe. Mills and iron works employing a considerable part of the waters of that river, and entirely dependent upon them, had been established before the incorporation of the company. The act of incorporation reserved or appropriated to one of the proprietors, whose rights were afterwards acquired by Mr. Blakemore, the surplus water not required for the use of the canal. The act authorized the canal company to make all such works, etc., as they *should think proper* for completing, maintaining, improving and using the canal and other works. The capital which the company were authorized to raise was £90,000; and it was provided that if their annual profit should exceed eight per cent. on that amount, the tolls were to be reduced. The company having proceeded to construct the canal and works, and having expended the £90,000, found that it would require a further sum to complete them, and to make a desired extension of the canal; whereupon a supplementary enactment authorized the extension and completion; and enabled the company to raise an additional £10,000 for these purposes, provided that everything should be finished within a prescribed time. This was done. Afterwards, and after the expiration of the time limited, the company improved the canal, and increased the supply of water for it, by making a new steam engine, and a reservoir; and, at a subsequent period, made a further improvement by widening and deepening the canal. These improvements diminished the supply of water for Blakemore's mills and works. It was decided at law and in equity, and by the House of Lords, that the act of incorporation had been an *apportionment* of the water power between the company and Blakemore, and, *therefore*, that, after the canal was finally completed, the company had no right to enlarge or alter it to his injury. (1 M. & K. 154, 162, 167, 170; 3 Y. & J. 60; 1 Cl. & F. 262; 1 M. & K. 171-176, 177-178; 2 C. M. & R. 133.) In this case Lord Eldon (1 M. & K. 162) made the remark which has been criticised as above. He made in the same case another observation which has also been criticised. It was that if individuals come to the legislature, and apply for a canal or a railway act, and the legislature, on being satisfied that the railway or canal can be made at an expense of, say £100,000, forms them into a company with power to raise money to that amount, the authority is given upon a representation by them, and in full confidence by the legislature, that such a sum will enable them to complete the work; and, if they find afterwards that £100,000 is not enough, the Court of Chancery, Lord Eldon thought, would find it very difficult to allow them to proceed with the work until they had obtained further legislative authority. (1 M. & K. 164.) This observation should not be understood with an unrestricted application. Upon the question of encroachment on Blakemore's water power, the limit of the authorized amount of investment was a measure of the company's privilege; and Lord Eldon's observation applies wherever a like principle is in question. But an unqualified application of his words to other cases cannot be made. It might, in many cases, promote unwarrantable interference with the execution of authorities legislatively conferred. (See 3 M. & Cr. 422-426; Redfield, sec. 210, 4th ed., vol. 1, pp. 332-334.)

It is contended on the part of the complainants that, as in the cases of the Chesapeake and Delaware Canal, and the Stourbridge Canal, so

here, the profit of the defendants cannot be derived from any business not within the direct and express provisions of their charter.

But the reasons for thus applying the rule of strict construction are insufficient. The present question is, *on this point*, neither that of monopoly in the defendants, nor that of abrogation, restriction or abridgment of any rights which the public would otherwise have. A different, or qualified, if not an opposite rule of construction, applies to questions of the capacity of the companies to improve the means and increase the facilities of transportation, or otherwise to enlarge the sources, or expand the development of legitimate profits derivable from varied uses of the corporate franchises. Under the latter head, useful incidental or auxiliary corporate functions may be attributable by *necessary* or *fair* implication. (4 P. F. Sm. 316; 3 Casey, 351, 352.) Legislative charters of improvement companies may, as to such relations, even be construed liberally. (7 B. & C. 731.) We have already seen this exemplified in the transportation of goods having ulterior destinations.

Another example may be found in the charter of the same Glamorganshire Canal Company, which has already been mentioned as exemplifying, in another case, the application of the rule of strict construction. An account of the annual profits of that company was from time to time taken in a manner prescribed by the charter, in order to ascertain whether they amounted to eight per cent. of the capital, in which case the tolls were to be reduced, as has already been stated. It was twice decided by the Court of Kings' Bench that, in this account, the company were to be credited for their expenditures in making the same improvements already mentioned, as causing encroachment on Blakemore's water power. These were the steam engine, the reservoir, and the deepening and widening of the canal. The question thus arose between the company and freighters on the canal, who were interested in obtaining the reduction of tolls; and, in one of the cases, the promoter of the controversy was the same party, Blakemore, but in the different relation of a freighter. The credits were, in each case, allowed as the cost of improvements by the company, which were, in this relation, and with reference to public interests generally, authorized by the charter. In other words, the improvements were properly made as against all the world except Mr. Blakemore as owner of his apportioned water-power. On the question of expense attending the supporting, maintaining and conveniently using the navigation, the court, in language already quoted, said that the words of the charter "ought to receive a liberal construction." (12 East, 157; 7 B. & C. 722, 731.) These decisions were approved in the cases decided, on the same legislative words, in favor of Blakemore as owner of the water-power. (1 M. & K. 170, 171; 2 C. M. & R. 142.) The rule of strict construction therefore does not apply without qualifications, which are overlooked in the argument for the complainants.

Before stating another of the arguments in support of the complainant's objection, an observation of some importance in the case becomes necessary. It is that a railroad company having a capacity to act as a common carrier is not obliged to do so, even upon the line of its rails; and if engages in the business at all, may do so generally, or only as to freights of certain kinds, light or heavy, small or large, or for only a

part of the line of rails. (4 Exch. 373, 374; 7 Exch. 712; 6 H. & N. 654; Shelford, Glen's Ed. II, 613, 614; Redfield, § 183, 4th ed., vol. 2, pp. 121, 132; and see 1 El. & Bl. 858.) So the company may have an option whether to engage or not in the accessorial or incidental carriage, off the rails, by horse power, to and from the depots and stations, or the offices of reception and delivery, that is to say, from the doors of consignors, and to the doors of consignees. (See Law Rep. 6 C. P. 561, and other cases.) Now companies which have made no public profession or offer to engage in the accessorial business of collecting or delivering, are not required to receive any freights except at their own stations, depots, or offices of reception, or to make any delivery beyond them. (23 How. 39; 5 Wallace, 495; 6 Casey, 247; 10 P. F. Sm. 114, 115; 19 P. F. Sm. 377; 1 Rawle, 203; 10 M. & W. 420, 421; Law Rep., 3 Exch. 189; 4 D. & E. 581; 5 D. & E. 395, 397, 400; 8 Taunton, 443; 3 Mann. & Gr. 687-690; M. S. cited, 15 Vin. 348, pl. 25; 10 Metc. 472; 1 Gray, 263; 16 Gray, 134; Redfield, § 175, 4th ed., vol. 2, pp. 60-64.) But a company which does engage in such accessorial business, must, in like manner as other carriers by land, make deliveries at the doors of all consignees who do not dispense with such delivery.

The argument for the complainants which may now be stated, is a mere assumption that, because a company which has not made any such engagement to the public, is excused from delivering beyond the precinct of the railway, therefore such an engagement cannot be warranted by the company's charter. The assumption is of the very point or proposition which was to be demonstrated.

In most of the cases heretofore cited as denying to the defendants a monopoly of this accessorial business, and in most or all of the cases hereafter mentioned upon questions of the defendants' charges for the accessorial service, the lawfulness of their participating in such business was impliedly if not expressly recognized.

The objection seems, therefore, to have no support of reason or authority.

But a railroad company, so far as it actually or professedly engages, either generally or specially, in the business of a common carrier, is under at least the same obligations to the public as an individual common carrier upon a route of any other kind. (12 Wallace, 270.) To the extent of the means of convenient transportation which are, in the course of a common carrier's business available, he cannot refuse to receive goods for transportation which are seasonably offered; and he is bound to serve all persons *impartially*. A railroad company, as it cannot encounter competition *upon* the rails, may have consequent *inseparable* advantages in conducting the accessorial business with horse-power. This gives peculiar force to the reasons that the company should be restrained in the latter business from *assuming* PREFERENTIAL facilities to itself, or *extending* them to any one else. (12 Harris, 378; Law Rep., 4 H. L. 237; 1 B. & S. 162, and other cases cited hereafter.)

Railroad companies have, in this respect, an immense power whose abuse cannot easily be prevented. On all questions under this head therefore, to guard against the danger of encroachment on rights of the public, the charters of the companies are construed strictly against themselves and liberally in favor of the public. (7 M. & G. 288, and

see 6 El. & Bl. 108, 109.) This applicability of the rule of strict construction to such questions of possible encroachment is obviously consistent with its inapplicability to the converse question of the right of the companies to compete fairly with any one of the public in the accessorial business.

The general relations of the *defendants* to the public include those to the *complainants*, considered as *one of the public*. Such relations having been defined, we may, before applying the principles which have been stated, consider the relations of the *complainants* to the public, and to the defendants.

The complainants appear to have been engaged in the business of *express carriers* very extensively, and perhaps without always encountering such free competition as to promote interests of the public.

Express carriers intervene between a principal carrier and persons usually unknown to him whom they represent at each end of his line of transportation. Those whom they represent at the place of departure may be called *transmitters* to distinguish them from consignors, known as such to the principal carriers. The parties who are to receive the goods at the place of destination may, in order to distinguish them from consignees, known as such to him, be called *destinees*.*

Middlemen are always at hand everywhere to execute any incidental function of transportation which a principal carrier may omit to perform. They may have more or less independent relations to the principal carrier. Before and since the commencement of the use of locomotive steam power upon land, middlemen have acted variously in different countries, not merely as agents of transmitters and of destinees, but also as, in certain respects, carriers, or sub-carriers, between them. There are, neither in Europe, nor in this country, middlemen whose relations, public and private, are, in all respects, such as the complainants define their own to be. Their former contracts with the defendants indicate, however, that what they now claim as independent rights were, in part at least, stipulated for by them as privileges to be enjoyed only at sufferance, or until determined by notice.

When the rights and obligations of those here called express carriers are properly defined, their legal relations will appear to be, in general, very similar to those of certain European middlemen, though, in some special respects, perhaps different from any in Europe. Differences may arise from local usages of traffic and other commercial intercourse. The French law, differing in one respect from our own, and from that of England, has always obliged all railroad companies acting as carriers in anywise however, to make deliveries at the doors of all known consignees who do not dispense with such delivery. (Duverdy, secs. 224, 227, 228, pp. 321, 325, 326.) But the French companies cannot insist upon performing such service for consignees who, dispensing with it, choose to receive the freights at the railway depot or station, or delivery office (Ibid., secs. 225, 226, 229, pp. 322, 323, 328); and those companies are under no obligation to collect freights from consignors. A French middleman who, as representing transmitters, carries goods to a railway reception office, depot or station, often represents also destinees.

* The word *destinatory* would be objectionable because, in France, *destinataire* has a more general application. (See Duverdy, sec. 3, p. 20.)

in which case, he, on their behalf, or as being himself both consignor and consignee, dispenses at the other end of the line, with all service of the company by horse power, and renders it himself, making the ultimate deliveries.

In England, so long as the railroad companies were carriers by rail only, middlemen conducted the auxiliary business on a large scale, not limiting it exclusively to light small matter. English railroad companies very soon became desirous of participating in the profits of such business, or of appropriating all the profits of it to themselves, or to those whom, with or without a profitable consideration, they favored. At first they seem to have either farmed the business out, or to have conducted it through contractors or otherwise favored sub-carriers. Afterwards, the companies, or one or more of them, engaged in the business themselves. In each of these progressive stages, litigations occurred from encroachments by the companies upon rights of middlemen desirous of maintaining, as carriers, independent relations with transmitters and destinees. Chief Justice Erle called such middlemen *intercepting* carriers. The designation was inapplicable because they were engaged in a useful business which had been legitimately established before the railroad companies were directly engaged in it, and because it was, after they engaged in it, a business proper for the most unrestricted competition.

The defendants, and, it is believed, most of the railroad companies in the United States, have heretofore either farmed out to express companies the business of collecting and delivering the light small freights transported in fast lines, or have conducted it through such companies, as contractors.

All such conventional relations of either kind between the complainants and the defendants terminated, as their contracts had provided, when sixty days from the time of the notices expired.

The defendants now both carry such freights by rail, and use horse power of their own to collect and deliver them, as they were formerly collected and delivered by the complainants. The defendants profess that they have no purpose to exclude anybody from the business of rendering like service by horse power to the public for profit; and seem particularly to disclaim the intention to hinder the complainants from participating in such business.

The defendants ought not to be impeded in the execution of their purpose, if it really is to reduce charges to the public by promoting competition, or if it is to participate fairly in the profit of the use of the accessorial horse power without unreasonable exaction from the public.

The subjects of dispute may be classed under two heads. The first includes the complainant's demand of certain facilities and accommodations in their express business. The second includes the alleged pecuniary overcharges, to which they object. The arguments on their behalf under the second head are generally well founded; but are, in a great measure, fatal to their own pretensions under the first head.

It has already been said that they have no present conventional rights. It might, therefore, seem unnecessary to inquire whether, under former conventional arrangements, they had a covert monopoly or any undue facilities or advantages. Indeed, the complainants are not understood

as now insisting upon preferential facilities to themselves in right of past conventional relations. That contention would be palpably absurd. But they do insist upon receiving facilities and accommodations of great expansion, which they certainly endeavor to define by the standard of the former practical relations. The most favorable way of stating their pretension is that they claim facilities and accommodations proportional to the actual and prospective expansion of their own express business. If such facilities and accommodations are neither preferential to themselves, nor inconvenient to others, the demand may be reasonable. But if they are exclusive or preferential, their allowance would promote, if not perpetuate monopoly. The question heretofore considered has been, when they were *preferential*, not whether a railroad company *must*, but whether it *can* allow them. On the latter point, Cockburn, C. J., said, that "If an arrangement were made by a railway company, whereby persons bringing a larger amount of traffic to the railway should have their goods carried on more favorable terms than those bringing a less quantity, although the court might uphold such an arrangement as an ordinary incident of commercial economy, provided *the same* advantage were extended to all persons under like circumstances, yet it would surely insist on the latter condition, and would interfere in the case of any special agreement by which the company had secured to a particular individual the benefit of such an arrangement to the exclusion of others." (5 C. B. N. S. 354, and see in 1 B. & S. 160, the observation upon 6 C. B. N. S. 639.)

Such is the limit of the corporate *power*. The contention that the company is under a *compulsory* obligation to allow such a preferential advantage is novel.

These remarks are applicable to the question whether the complainants can reasonably require to have, in a passenger train, a car furnished by themselves. The question depends upon relative considerations, in which the convenience of others, not less than of themselves, must be consulted with a view to arrangements of the trains, and to accommodations in and out of depots and stations, etc.

The complainants cannot reasonably require any space to be set apart for their exclusive use in a car of the defendants in such a train. If the space be vacant, those who first bring goods ought to have it. If it be filled, the goods in it cannot be displaced.

The requirement, as of *right*, for an agent in charge of the complainants' express matter, of any other accommodation or place in the trains than that of an ordinary passenger under the control of the company's police of the road, seems to be quite unreasonable.

More unreasonable is the pretension that he can, as a passenger, carry, without other payment than as for baggage, a trunk which contains express matter.

The complaint that the defendants do not allow to express carriers the use of the platforms and landings, etc., at the depots and stations, appears to be connected with a dispute of the right of the defendants to establish offices and warerooms of reception and delivery away from depots or stations. The question implies that the offices must be conveniently situated for the accommodation of the public as well as for purposes useful to the defendants. The question thus qualified, seems to admit of no answer but an affirmative one.

It has been so decided in France (Duverdy, sec. 229, p. 328); and has never been disputed in England, where such offices are in many cities and principal towns. (See 6 El. & Bl. 110, 11 C. B. N. S. 787.) Professor Parsons intimates that most carriers have a receiving office or depot, or station, or place of reception of some name. (On Contracts, I. 653, Bk. 3, ch. 12, s. 8.) Indeed, even express carriers have, it is believed, places of reception and delivery distinct and more or less distant from the places where their other business is transacted. These are not matters with which a judicial tribunal can meddle, unless an evil motive and effect is justly attributable.

The argument for the complainants, citing 12 Harris, 378, and 57 Maine, 188, admits (though perhaps without an intention to concede) that the defendants cannot allow to the complainants, or to any other express carrier, facilities or accommodations amounting directly or indirectly to a monopoly or partial monopoly. A leading English decision (10 M. & W. 399, pl. ult. of head note), cited with approval in the case in 12 Harris, shows that no advantage, however small, could be *preferentially* allowed by the defendants to any such party as the complainants.

Thus the defendants may appoint a reasonable hour of the day or night for the closing of their office for the reception of freight. But they cannot receive for themselves as carriers, or for the complainants, or for any other favored party, at a later hour. (6 C. B. N. S. 639, 12 C. B. N. S. 758, 1 B. & S. 112.) In a case of this kind in England the peculiar views of Erle, C. J., caused, at one time, a division of opinion upon the point (Law Rep. 1 C. P. 588). But the rule of decision was afterwards re-established (Law Rep. 6 C. P. 194). If no such hour has been appointed, the complainants cannot require that any freight be received which is not brought a sufficient time before the departure of the train to allow convenient reception, loading, booking, way-billing, etc.; and cannot require that any parts of the latter business be transacted by their own agents unless agents of other middlemen are allowed the privilege. Other examples might be cited. (See 11 C. B. N. S. 787, and other books.)

The complainants do not allege their willingness to submit themselves, in such respects, to reasonable regulations of their business, to which public interests require their subjection. Their footing in equity is, therefore, very insecure, even where they might otherwise, on certain other points, be entitled to relief. They certainly are themselves endeavoring to encroach upon rights of the public; and any partial success of their present effort might prevent equal competition, or embarrass the defendants in transacting proper business at their depots or stations, or at the approaches or outlets, or at the offices of delivery and reception.

The remaining questions are those of alleged overcharges by the defendants.

If we recur to the analysis of the charge formerly made by the defendants for carriage only by rail, it will be understood that their present charge, being a single aggregate sum, includes an additional amount or elementary value. It is the amount of compensation for the additional service which they offer to render by horse-power in collecting and delivering the freights. It is to be regretted that they did not, after experience of the injurious mistakes of English railroad companies, publish the

definite amounts of the intended additional charge. This would have given a fair opportunity of competition by any parties willing to serve the public for less, or for the same rates, and have prevented the possibility of any continued monopoly of the business by the complainants, or overcharge by them, or by any one else. It is also to be regretted that the defendants did not, when requested, make known to the complainants the particulars of any intended new tariff of charges. Whether the complainants were, of absolute legal right, entitled to the information thus asked, or whether they are entitled to the disclosure asked under this head of their bill, will not be considered now, as the question may possibly arise hereafter in the cause, on an exception to the answer, or in some other form.

The defendants, in effect, claim a right of making the additional charge to those who reject or dispense with the additional service.

There is no difference between such a claim of right, and a refusal to deduct the amount from the aggregate sum which includes it. The latter is the form of the question in which it here arises. It so arose in England. The defendants, in support of this arbitrary pretension, rely, not upon any precedent of judicial authority, but wholly upon the reasoning of Erle, C. J., in his dissenting opinions which have been mentioned. It has been truly said, that his reasoning depends upon an assumed moral right of the railroad companies to such a monopoly as would authorize them "to throw obstacles in the way of other carriers interfering with" it. (See Law Rep. 4 H. L. 244.) We have seen that the assumed foundation in monopoly fails. The question then becomes a very simple one of common sense; and indeed, independently of the point of monopoly, seems to be a very plain one of justice.

The additional charge, or the refusal of the rebate, is a simple extortion. It forces the unwilling party either to accept the service at each end of the line, or to pay the value of such service twice at each end. Nothing but absolute legal monopoly could authorize the enforcement of such a charge. It seems from the decisions that where no statute applies, no rebate short of the whole value of the charge for horse-power can be reasonable. (7 M. & G. 253, 290; 6 C. B. N. S. 639; 16 C. B. N. S. 137, affirming 14 C. B. N. S. 1, and acc. with 5 C. B. N. S. 336, 363; see 1 B. & S. 159; and compare 10 M. & W. 399, 424, 420-1, with 6 El. & Bl. 109, and with 12 Harris, 382.)

A common carrier can charge no more than a reasonable compensation for the proper service. The charge may, under different circumstances, vary in amount without being therefore necessarily unreasonable. If reasonable, it may, though unequal, be unobjectionable; but, in general, equality is the standard of both reasonableness and impartiality. It may be added that *systematic*, as distinguished from *occasional* inequality, never can be reasonable and impartial. (Law Rep. 4 H. L. 239; 5 C. B. N. S. 354.) Equality, however, means of course *relative*, as distinguished from simple *ratable* equality by weight or bulk. Ratable difference, which is not relative inequality, may consist in proportions of bulk to weight, in the divisibility or indivisibility of masses, or other conveniences or inconveniences for packing or transportation or delivery, or may depend upon degrees of liability to undergo, or to cause, injury or deterioration. Other examples might be variously multiplied.

The charter of the defendants limits the rates of their tools, but contains no limitation of the rates which they may charge as carriers. A freighter sued them in equity to prevent them from charging, as carriers, beyond the prescribed limit of the tolls. The bill was dismissed because the limitation did not apply. (4 P. F. Sm. 310.) The reason of the decision has already been fully stated and explained. The defendants are not justifiable in founding upon it an argument, which they urge, that they may, as carriers, charge whatever amount, reasonable or not, they may please. On the contrary, they claimed in that case only the right of making a *reasonable* charge; and their answer averred expressly that the charges in question were and always had been "most moderate and reasonable." The case was finally heard upon bill and answer. As there was no replication, the reasonableness of the actual charges could not be disputed, if the enactments of the charter allowed any excess whatever beyond the prescribed limit of tolls distinctively so called. The case therefore is an authority rather against than in support of the present argument for the defendants. Indeed, if it had even been expressly enacted that they might charge what they should *think fit*, this would mean what they should *reasonably* think fit. Martin B. so instructed a jury (11 Exch. 744); and, in banc, though it was not necessary to decide the point, there was a dictum of Alderson B. to the same effect. (Ib. 749, 752.) This dictum, which was afterwards cited without dissent by Williams, J. (5 C. B. N. S. 117, 118, and with seeming assent by Willes, J., Ibid., p. 120) has the support of a previous decision of like tendency (12 East, 157), and is conformable to a rule of general jurisprudence for the interpretation of such words. (Dig. 19, 2, 24 pr, 5 Co. 100, Poth. Obl. No. 48; 2 Johns. 395, 401; 4 Serg. & R. 1, Baldw. 388; 4 Bingh. N. C. 105; 4 El. & B. 256.) But the words of the defendants' charter suggest, independently of the argument, no such question.

If the charter had contained words limiting the rates of the freight money or, what would be the same in effect, limiting the addition which might be made to the amount of tolls, the defendants could optionally have charged the maximum rate, whether it would otherwise have been reasonable or not. (12 P. F. Sm. 228, 229.) They might therefore, in that case, have established a tariff of charges equal to, or below, the maximum rates; and might have made such *occasional* impartial abatement from the tariff or ordinary rate as they saw fit. There is no legal necessity that such abatement should be absolutely *uniform* if the occasional deviation is *impartial*. But if the deduction is disproportional to any exigency which may have caused it, this will be strong evidence that it is neither reasonable nor impartial. The two last sentences repeat what had been previously said. Arbitrary discrimination is of course illegal; and so is discrimination for the advantage or disadvantage of one person, or of a select few. There can be no abatement for the advantage direct or indirect of the company itself, or of its managers or officers or agents or servants or friends. The language of the Supreme Court of the State (12 Harris, 381-383; 11 Wright, 340, 341; 12 P. F. Sm. 230) is, in this respect, conformable to what has been repeatedly decided as to railroad companies in France and in England, and is generally recognized as law throughout the United States.

The defendants, however, contend that English decisions upon the subject are not of authority here, because English statutes prescribe, not simple *reasonableness* in the charges, but *equality*, which, it is argued, means *ratable* or *arithmetical*, as distinguished from *relative* equality, except where it is otherwise positively enacted. This view has not been taken by the Supreme Court of the State; nor is it correct. In one of the cases last cited, that court said that those English statutes are but declaratory of what the common law is. (11 Wright, 340, 341.) This observation is practically and almost literally correct. The English enactments, where they give a latitudinarian option as to rates of charge within a prescribed maximum, provide that such charges must be made equally to all persons *in respect of like things under like circumstances*. The requirement of like things and like circumstances, if omitted, would be implied. This was the meaning of the Supreme Court. The English statutory requirement thus imports relative equality, not simple ratable equality. English courts have so understood and applied the enactments. Moreover, in many of those English cases whose authority the argument would impugn, the question of reasonableness was discussed; and in some of them it was decided, as distinct from that of simple equality.

English statutes, in allowing the great latitude of charges, have, however, in favor of railroad companies, altered, in some degree, the rule of the common law, which required the charge of a common carrier to be always *reasonable*. In the compensating requirement of *equality*, English statutes have, in some degree, substituted a *legal* criterion of rightfulness of the charge for what was, at common law, only *evidence*, or part of the evidence for a jury on the question of reasonableness. In an action at law inequality in charges had thus previously been *evidence* of unreasonableness, the effect of the evidence being determinable by the verdict. (See Law Rep. 4 H. L. 237, 239.) In Pennsylvania, the question is wholly for the jury, except so far as the rules of the common law may be qualified by a statutory limit, or prescribed maximum, of the charge.

It may be observed that a court of equity, where the question, whatever may be its form, is in the least doubtful, awaits the decision of it by a court of law. (1 H. L. 35, 3 Eng. R. R. Ca. 561.)

In the English decisions, if we consider the importance of the questions, and the earnestness of the contentions, it will appear that, instead of the contrariety of opinions imputed in the argument, there has been a general uniformity. The questions, however elaborated, have indeed, perhaps, been more important than difficult. If they were considered anew independently of the authorities, the decisions would certainly, on original principles, be the same.

We have now reached the first of the two questions in the present case. It is whether to grant an interlocutory injunction restraining the defendants from including *any* rate for the use of horse-power in their charge to the defendants, who do not use it, or from otherwise making the extortionate overcharge.

If the complainants, in the simple relation of *one of the public*, had, submitting to all just and proper regulations of the defendants for the promotion of the public interest, and the administration of their

own franchises, asked only protection by such an injunction in the lawful business of competing carriers, it is possible that they might have had such relief before obtaining a judgment at law, or perhaps even interlocutory, though this would be contrary to the ordinary course of equitable procedure. (1 H. L. 35.) To justify such a departure from the ordinary course, the legal right in aid of which the injunction is asked must, however, be quite free from doubt.

It is not necessary to decide whether this would have been such a case. The complainants have not so proceeded as to enable them to ask interlocutory relief under this head. If they "ask equity, they must do equity, or, in good faith, aver a readiness to do it. This they have not done, either in, or, so far as appears, *outside of* their bill. Possibly this may not insurmountably impede them at the final hearing, when a decree may be so framed as to adjudge against them the questions upon which their positions are untenable. But these questions cannot be now so decided. To leave them open, and, at the same time, place the complainants interlocutorily on the footing of a successful litigant, would be uneven justice.

The same reasons precisely do not apply to the remaining question. It is that of the *packed parcels*.

What is called in England the packing of parcels, and in France groupage à *couvert*, must be distinguished from the case of loose or *unpacked* parcels, groupage à *découvert*. Neither designation should be understood as applicable to articles of such description, for purposes of transportation, as meal, grain, coffee, sugar, etc., which, when sent in large aggregate quantities, are usually made up of several bags or parcels.

The case of *unpacked* parcels occurs where articles or parcels, which *might* be united as a single package, are consigned by—or to—the same person. In such a case, where no legislation applies, the railroad company, as carrier, has a right to charge for every package or parcel, as a several subject of transportation. (6 El. & Bl. 77.) It seems that, in Europe, the right has been very often waived, and a single charge for the whole has been made by weight, as if they had composed a single package. *Occasional* acts of such liberality, causing *accidental* inequality in charges, do not impair the right of making the charges separately in other instances. (1 B. & S. 154.) But if it is dispensed with *systematically* to persons in any kind of business, the dispensation must be extended alike to all without any discrimination against a middleman who sends the unpacked parcels consigned to himself or to his own agent. (7 M. & G. 291, 292.) But the company may fairly discriminate between such a case and one in which, though the consignor is the same person, the parcels are distributable among several persons at the end of the line. (4 C. B. N. S. 63, 1 B. & S. 165, 166.) The decisions of some of the questions in some minute particulars have been somewhat affected by British legislation. (Compare 7 M. & G. with 1 B. & S.)

The case of *packed parcels*, before railroads were known, occurred thus: A middleman representing, as a carrier, one or more transmitters of numerous articles or parcels to several destinees, whom he also represented, enclosed or packed the articles or parcels together so that they composed a single item for transportation by a principal carrier.

who knew only the middleman and his agents. The parcels thus packed were charged as for a single package, if it was of convenient bulk and weight.

When the principal carrier is a railroad company, the middleman carries the package by his own horse-power to the depot, station or office of reception, consigning it from thence, in his own name, to himself or his own agent at the place of destination, where he receives it at the railway depot, station or office of delivery, and carries it by his own horse-power to the respective destinees. The rates for carriage by rail are such as enable the middlemen so to adjust the bulk and weight of the package to the tariffs of charges that the profit of the railroad company is much smaller than if the parcel intended for every destinee had been a separate small package. This detriment, though perhaps a hardship to the carrier by rail, was no reason that he should object to receiving and carrying the packed parcels, unless the package in mass was of inconvenient bulk or weight for the intended transportation.

Yet, where no such inconvenience could be suggested, English railroad companies formerly refused, as the defendants now refuse, to receive such package unless upon payment of the aggregate sum which would have been chargeable for the carriage of the several parcels if each of them had been a separate package. An English judge of distinguished eminence, Willes, J., said that it was some time before he could understand that such a question could be seriously argued. (5 C. B. N. S. 119.) The argument was made intelligible only by dividing the question.

As it was divided, the points were, first, whether the aggregate charge of the full sum of the rates for several packages could be sustained; secondly, whether the carriers by rail could make a small addition to the charge, as for a single package, in order to cover the risk of contingent liability to actions at the suit of unknown transmitters, destinees, or owners of the several parcels or articles enclosed.

The reasoning on the first point against the railroad companies was unanswerable. Since the decision in 10 M. & W. 399, the contention has in England been principally upon the second point. In the present case, the *argument* has been upon the second point, with, however, an unwarrantable *assumption* of a conclusion upon the first, as if it were consequential.

In England, juries "have often negatived, that in point of fact, carriage" of the packed parcels, "for *collecting carriers* imposes greater risk or expense upon the railroad company," than would be incurred if they were not packed. (Law Rep., 4 H. L. 247; 11 Exch. 758, 759; 5 C. B. N. S. 112, 113.) The courts approving the verdicts, have decided that "such carriers are entitled to have their packed parcels carried *upon the railway* for the same price as other persons."

As to risk of loss from carelessness or from pilfering, there may be less risk than if the parcels were separate. The question was also put to juries in England, "in respect of the supposed liability" of the railroad company, as the principal carrier, "two several actions" at the suit of unknown parties owning the goods. On this point, it has been said that there has not, in England, been a single instance of such a suit; and the language of English judges might seem to import even a doubt whether the suit would be maintainable. This part of the question is differently

considered in the United States. There is no doubt, either on principle or on authority, that several actions, at the suit of the respective owners are maintainable (6 Howard, 380, 381; 6 Binney, 129; Redfield, § 169, 4th ed., vol. 2, p. 18); and actions at their suit are brought much oftener against the railroad companies than against the middlemen. If the principal carrier is regarded only as an agent, he may be sued by the unknown party interested. If the public employment as carrier is alone considered, immediate privity of contract is not essential to the right of action against him for an injury suffered through his default.

The question was moreover under the English carriers act of 1830, very different from what it was in the United States. An English act of 1854 has nearly restored the English law in this respect to what it had been before 1830. The difference was that in the intervening period, an English railroad company, as a common carrier, could exempt itself from liability even for culpable negligence by making its engagement conditional.

The irrational state of English law on the subject in that interval, and the difference now in question, were fully explained in a case in the House of Lords in 1863. (10 H. L. 493-495.) It is, however, to be noted that one of the English verdicts, judicially approved, on the question of the risk of suits, was after the new act of 1854. (5 C. B. N. S. 112, 113.)

The question left thus to the English juries was in great part matter of law. But matter of fact is involved in it; and here, as in England, the law on the question of packed parcels must be administered through verdicts of juries. An English railroad company was legislatively authorized to make an additional charge for carrying packed parcels, and established an additional rate accordingly; but did not charge the addition to wholesale dealers who transmitted such parcels. Middlemen, who were carriers, being compelled to pay the additional rate, sustained an action to make the railroad company refund it. The proof convinced the jury that the exemption of the wholesale dealers was preferential and habitual. (3 H. & C. 809, 849, affirmed Law Rep. 4 H. L. 226.)

The defendants take the untenable extreme position that they can make the full charge as for separate packages. On this point, of course, the charge cannot be maintained. But the inquiry still open is whether a small addition to the charge for the package in mass may not be allowable to cover the risk of contingent liability to several actions.

This increases the difficulty of the complainants' case on the question of granting an injunction. In such a case in England, the Court of Chancery refused to grant an injunction until the right should be determined at law. (3 R. R. Ca. 538.) But the decision was mainly on the ground of the complainants' delay. The case already cited in 1 H. L. Ca. 35, is to the effect that, if the pecuniary excess of the charge were ascertained, an injunction would be proper *after* a judgment at law. But the case in Law Rep., 1 Exch. 32, under the auxiliary equitable jurisdiction conferred by the English common law procedure act of 1854, indicates doubt whether, on the question of packed parcels, the *uncertainty* in the amount would not, even after judgment at law, prevent the application of the rule of the former decision.

The distinction is, perhaps, over-nice, and the doubt may not be well founded. But here no judgment at law has been obtained; and there is an open part of the question of right which seems to be determinable at law only.

To meet the exigency of questions with railroad companies, whether as to their withholding reasonable facilities, or subjecting to undue or unreasonable prejudice or disadvantage, or as to the giving of any undue or unreasonable preference or advantage, a summary jurisdiction has been conferred in England upon the Court of Common Pleas by a statute. (17 & 18 Vict. c. 31, ss. 3-6.) But no other English court of law has any such jurisdiction; nor has the English Court of Chancery. If the creation of such a summary jurisdiction here is expedient, it should not be vested in courts of the general government. On the continent of Europe the questions are judicially cognizable only for the enforcement of legislative and executive regulations. The decision of questions like the present is, under most European governments, by an executive department and summary.

The proportions of the subject are certainly enlarged here beyond the usual measure of judicial administration. But the experiment of an executive board of railroad commissioners, where tried, seems to have failed of success.

All that can be done at present is to refuse the interlocutory injunction, giving to the complainants leave to proceed at law, during the pendency of the proceedings in equity, if they shall be so advised.

Thus far, it has been assumed that the suit is by a competent party. The Adams Express Company is an association organized under laws of New York of 1849 (ch. 258) and 1854 (ch. 245), which confer certain powers and privileges possessed only by corporations; and enact that the associations may sue in the name of their president. But the latter act provides that nothing contained in it shall be construed to give them any rights and privileges as corporations. Notwithstanding this enactment, an association of this kind is considered, even in New York, a corporation for certain purposes. (15 How. N. Y. Pr. Rep. 172.) That it may extraterritorially be so considered for such purposes appears from a comparison of the case in 100 Mass. 531, affirmed in 10 Wallace, 567, with 13 Peters, 586, 591. It does not necessarily follow that such a joint stock company can sue in this court as a citizen of New York, under the authority of the series of decisions beginning with 2 Howard, Sup. Ct. U. S. 497, which sustain such suits by corporate bodies of the ordinary kind. If the latter decisions apply, it is possible that, through comity, the express company may be allowed a capacity to sue *at law* in the name of their president, extraterritorially as well as in the State of New York. (Compare the *Chamberlain of London's case* (5 Co. 62 (b) 63 (b) with 10 Wallace, 567, and 13 Peters, 586, 591.) But even in that case it might, in a suit in equity, be necessary to unite the express company as a complainant. As this omission is, of course, amendable, the case may, in its present stage, be considered as if that company were already complainants of record. But whether the amendment be made or not, the question of jurisdiction will be contestable. It cannot be decided without further argument than has been heard by the court.

Under the stockholders' bill there is very little to be added. If the

foregoing views are correct, the controversy, properly described, is not whether the defendants have usurped a franchise, but whether their franchises are administered rightly in special respects. Independently, therefore, of the reasons of a more general kind stated and explained by the circuit judge, the two questions of overcharge to which the numerous points of argument have been reduced, if cognizable under this bill, cannot be considered until the final hearing.

McKENNAN, C. J.—I concur in all respects in the opinion of Cadwalader, J.

Geo. L. Crawford, Esq., and Hon. Benjamin Harris Brewster for plaintiffs.

A. D. Campbell and James E. Gowen, Esqs., for defendants.

District Court of the United States,

Eastern District of Pennsylvania.

[Leg. Int., Vol. 29, p. 252.]

THE UNITED STATES, LIBELLANTS, *vs.* THE CANAL BOAT OHIO:
BOYLE, CLAIMANT..

A laden boat, which, having no sail, oars, or other motive power of its own, is drawn, by horses, through a canal, and from thence, through navigable waters of the United States, by a steamer, to a market, is not within the description of a ship or vessel in the act of Congress of 18th February, 1793, "for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same."

The applicability of the act is not, in this respect, enlarged or altered by the act of 20th of July, 1846, exempting such canal boats without masts or steam-power as were then by law required to be registered, licensed, or enrolled and licensed, from hospital dues and from official fees, etc.—or by the tonnage measurement act of the 6th of May, 1864—or by any other legislation of Congress in which the phrase *vessel*, or *ships and vessels*, may have been variously defined or applied.

The following are the principal sections of the act of Congress of February 18, 1793 (1 Ll. U. S. 305), which have been cited with reference to the proceedings in this suit:

Sec. 1. "That ships or vessels, enrolled by virtue of 'an act for registering and clearing vessels, regulating the coasting trade, and for other purposes,' and those of twenty tons and upwards, which shall be enrolled after the last day of May next, in pursuance of this act, and having a license in force, or if less than twenty tons, not being enrolled, shall have a license in force as is hereinafter required, and no others shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries."

Sec. 37. "That nothing in this act shall be construed to extend to any boat or lighter not being masted, or, if masted and not decked, employed in the harbor of any town or city."

Sec. 6. "That after the last day of May next, every ship or vessel of twenty tons or upwards (other than such as are registered) found trading between district and district, or between different places in the same district, or carrying on the fishery, without being enrolled and licensed, or if less than twenty tons, and not less than five tons, without a license, in manner as is provided by this act, such ship or vessel, if laden with goods, the growth or manufacture of the United States only (distilled spirits excepted), or in ballast, shall pay the same fees and tonnage in every port of the United States at which she may arrive, as ships or vessels not belonging to a citizen or citizens of the United States; and if she have on board any articles of foreign growth or manufacture, or distilled spirits, other than sea-stores, the ship or vessel, together with her tackle, apparel and furniture, and the lading found on board, shall be forfeited. Provided, however, if such ship or vessel be at sea, at the expiration of the time for which the license was given, and the master of such ship or vessel shall swear or affirm that such was the case, and

shall within forty-eight hours after his arrival deliver to the collector of the district in which he shall first arrive, the license which shall have expired, the forfeiture aforesaid shall not be incurred, nor shall the ship or vessel be liable to pay the fees and tonnage aforesaid."

The boat libelled was not registered, or enrolled and licensed, or licensed. The purpose of the libel was to enforce the payment of the fees and tonnage dues which would have been payable if the boat were a foreign vessel.

This boat was of a kind, which, in one of the opinions quoted below, was described as follows :

"The boats in question are of peculiar character, not corresponding closely, or in any other than a most general way, with any other description of water-borne vessel. They are vessels in one sense, because they are things which can and do contain coal, and are moved upon the water; but for substantive and independent use, they do not come within the popular notion of a ship or vessel, any more than any other water-tight box would do. They are a mere capacity of holding and floating, and being pulled by an external power, and nothing more.

"When the boat is passing through a lock, it is a box about forty-two feet long, ten feet wide, and four and a-half to five feet deep; a running board of about one foot wide extends along each side and across one end, to form a passage-way for the hands. At the other end there is a platform planked over for about eight feet in extent, to furnish accommodation to persons employed aboard, and to strengthen the work. The coal within is exposed to view, there being no deck, nor hatches, constituting a temporary or occasional deck.

"When two or more sections of the same description have passed the lock and come into the canal or river, they are connected end to end by hinges, and are moved in this connection together.

"On a canal they are moved by one or more horses or mules on the towing-path of the canal. In a river they are moved by a steam-tug. A man and two boys, or a woman in the place of one of the boys are the working hands, the horse or mule being ridden or driven by a boy, and the man and woman or the other boy remaining on board. When attached to the steam-tug, the horses or mules are commonly taken on board the tug, and the operatives are without employment until the horse or mule begins the work of towing in the canal. The vessel or boat, call it by what name is thought best, has no moving power within itself, nor can it be moved otherwise than in the mode thus described. On a canal, a horse or mule, or some other animal power, is indispensable, to give it the capacity to transport anything. On a river, a steam-tug, or a vessel that has a moving power within itself, is as necessary to give the boat the capacity to transport anything, as the animal power is on the towing path of a canal. The boat has, from its being water-tight, capacity to contain coal or anything else on the water without sinking; but of itself, or by virtue of any machinery, whether mast and sail, or anything else, it has no capacity whatever to carry or transport anything; and when it is on a river or open water, it must be attached to a vessel that has a mast and sail, or machinery for motion, and it is only as an appurtenance to such a vessel for the time being, that it has any practical use in transportation."

Such boats, having first come into use long after the commencement of the present century, a question which arose in 1845, and has never been decided, was, whether they were vessels within the meaning and application of the act of 1793.

In May, 1845, the president of the Lehigh Coal and Navigation Company, and certain officers of other canal companies, addressed letters to the Hon. Robert J. Walker, then Secretary of the Treasury, saying that their business was threatened with serious interruption from the proposed application to their scow-boats employed in the transportation of coal of the provisions of the act of 1793. They contended that the act did not apply to their boats, which could not with any propriety be considered as "ships or vessels" within the meaning of the act; which are navigated by persons without the slightest pretensions to the character of "seamen;" which are not engaged in the "coasting trade;" which are incapable of being employed without immediate detection in any attempt to evade the revenue laws; which have no masts, and were not in existence or use at the time of the passage of the act.

Accompanying these communications were the following opinions of counsel.

The first of them, after giving the description of the boats as above, proceeded:

"If the question, whether such a boat is within the act of 18th of February, 1793, were to be decided by the fact of there having, or not having, been a particular intention to include it, there could be no doubt that it is not within the act, because there could have been no particular intention to include a description of vessel, which at the date of the law had no existence. Neither canals, nor canal-boats, were at that time, or for many years afterwards known in the country. The boats and the mode of pulling them in an open river or bay, are altogether of subsequent invention or adoption. But this consideration is by no means decisive of their not being embraced by the enrolment act of 1793. No new variety of structure of boat or vessel can be deemed exempt from the operation of the law, if the general intent and provisions of the law embrace it, merely upon the ground that there was no particular intention to comprehend it. If such boats are within the general scope of the enrolment and license act, they will be comprehended by it, notwithstanding they are of recent invention and use. The general scope of the act is first to be ascertained. If that is so broad as to comprehend every species of vessel that is water borne, and is capable of holding cargo, and of being moved by the power of another boat, then there is no ground for exempting from its operation the boats or vessels above described, since they are water borne, and are capable of containing cargo, and are so moved. But if the scope of the act is narrower than this, and only comprehends ships or vessels of certain characteristics, then the inquiry will be, whether these canal boats have the requisite characteristics.

"The first head of inquiry then is, whether such boats are *entitled* to be enrolled and licensed under that act, and to enjoy the privileges of ships and vessels employed in the coasting trade and fisheries.

"The act of 1793 does not *expressly* require that ships and vessels to be included within it, shall have a particular character, and that if they

have not, they shall be excluded. It requires affirmative qualifications, and if any kind of water borne vessel is excluded, it is by *implication*, and not by express terms.

"Its first provision in its first section is, that ships and vessels enrolled and licensed, or if less than twenty tons, having a license in force, and *no others*, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries.

"There is nothing in any subsequent part of the act, which repeals or impairs the force of this enactment in regard to any description of vessel whatever. If a vessel is not enrolled and licensed, or if of less than twenty tons, is not licensed, she is not a ship or vessel entitled to the privileges of ships or vessels employed in the coasting trade or fisheries. What the consequences are which arise from her not having those privileges, must be ascertained from other parts of the act; but it is clear, that enrolment and license are indispensable to confer those privileges. No ship or vessel indeed is, by force of anything in the act, compelled to take out an enrolment and license. She is free to go without it, or without any papers at all, if she does not claim to exercise the privileges of an enrolled and licensed vessel. But if she is found doing certain things mentioned in the 6th section, without an enrolment and license, then she is acting in violation of the law, and the penalty prescribed by the law attaches, if she and her acts and doings come within the description in that section.

"Although there is no express exclusion by the act of any vessel from the benefit of enrolment, it is nevertheless true that the 2d section of the act does prescribe certain qualifications and requisites, without which a ship or vessel cannot be enrolled or licensed. That section is explicit in requiring that for the enrolment of any ship or vessel, she *shall* have the same qualifications, and the same requisites in all respects shall be complied with, which are made necessary by the act entitled an act concerning the registering and recording ships or vessels, passed the 31st of December, 1793; and without enumerating all of them, there are some which may be referred to as being necessarily confined to vessels of a certain description, and not applicable to such a kind of boat as is used for the transportation of coal upon canals, and is hereinbefore described.

"The carpenter's certificate may first be referred to as setting out what the law regards as the general or rather universal description of every ship or vessel that is entitled to enrolment and license. It must set forth, besides other particulars, the *number of her decks and masts*, her length, breadth, depth and *tonnage*. There are others, but these are the only qualifications stated in the carpenter's certificate, which it is necessary to refer to.

"They may be regarded as descriptive merely, or required only for the purpose of identification; and doubtless they are so in part; but as regards one of these qualifications, that of a *deck*, not only does it necessarily enter into the character of a sea-boat, without which it is wholly out of the question to speak of her as a coaster or as engaged in the *sea-fisheries*, but it is also a fundamental part of an enrolled ship or vessel, without which the act of Congress cannot be executed in regard to her.

"The rule prescribed for ascertaining her *tonnage*, necessarily implies that she has at least one deck; for an element in the admeasurement of

the tonnage is the depth of the vessel from the under side of the deck-plank to the ceiling in the hold; and if she has no deck, she has no certain tonnage within the law, either to be inserted in the enrolment or to be the basis on which her duties are to be estimated under the law.

"It is quite possible that an arbitrary line may be taken from where the under side of the deck-plank would probably be if the boat had one; but that is not within the enactment of the law, nor will it give the tonnage which is the lawful tonnage by which duties are estimated. The lawful tonnage is the tonnage under deck, and if the vessel has no deck, she has no such tonnage. Her tonnage may be what she will carry without sinking the boat, or falling overboard; but that is not the tonnage contemplated by the act of Congress. In fine, the law does not recognize an enrolled vessel without a deck; and there is no matter of surprise in this, seeing that it would be preposterous to suppose that the owner of a vessel without a deck, would ask for the privileges of the coasting trade, fisheries, etc., which she could not enjoy. Such a vessel wants qualifications that are indispensable to a registry, and they are equally so to enrolment and license.

"The certificate of enrolment, a form of which is given, descriptive in general terms of all vessels that are within the law, and which is accompanied in the act by directions for filling the blanks in the printed form with words descriptive of every vessel that can be properly enrolled, in like manner implies, if it does not more than imply, that the vessel is a decked vessel. It purports that the surveyor has certified that she has at least one deck, for it directs the number of decks to be inserted in a particular blank, and sets forth that the owner or person acting in his behalf has agreed to the description.

"It is possible that in practice a carpenter may certify that the vessel has no deck, and the custom house may fill the blank in the certificate of enrolment accordingly. But if they do, they deviate from the act of Congress, and reject what the act expressly requires, giving the privilege of enrolment to a vessel that Congress has made no provision for, but the contrary. When a deck is wanting, and her tonnage measurement is certified, it is impossible that it should be anything more than conjectural tonnage. It cannot be ascertained according to the rule prescribed by Congress, which is the only rule, and is the effective rule by which, and by which only, her tonnage duty is ascertained.

"Not only the objects of the enrolment law, but its language in many parts do so describe the ships and vessels comprehended by the act, as to show that open boats without the power of navigation in themselves, are not within its provisions, and have not the qualifications necessary for enrolment. When forfeiture is inflicted for trading without a license, or using a forged or altered license, or the license of another vessel, it is inflicted on the ship or vessel with *her tackle, apparel, and furniture*. Forfeiture is never inflicted without this description of accompaniments of a ship or vessel, in the commercial sense, being annexed; and it is known that in the law of insurance, these words comprehend and cover the sails, yards, rigging, cables and the like, the accompaniment of not only a decked, but a masted vessel. Such is the general commercial import of the words. The words *ship or vessel*, of themselves imply, in the ordinary

acceptation of merchants and mariners, a vessel competent for the sea. And in an act concerning the coasting trade and the fisheries, this must emphatically be their signification. It is wholly inadmissible to extend them to a scow, or to a boat, without a deck, that would be swamped by the ordinary waves of the sea. Such things do not rise to the dignity even of a barge or row boat.

"After a careful examination of all parts of the act, I entertain the opinion that such a boat as is described in the first part of this opinion is not entitled to enrolment. She wants the requisite qualifications. She cannot be *measured* according to law. Her *tonnage*, which means *tonnage under deck*, cannot be ascertained, for she has no deck. She can carry whatever can be put into her without sinking her; but though she has a *tonnage capacity*, she has no *tonnage measurement*. She has no mast and no deck, no power to avail herself of the privileges granted; and it would be preposterous to claim the privileges for her, because, without the aid of another vessel *that is also enrolled*, she could not exercise any of them.

"The 37th section of the act 18th February, 1793, may be thought to militate against this view. That section enacts that nothing in the act shall be construed to extend to any boat or lighter not being masted, or; if masted and not decked, employed in the harbor of a town or city. It exempts from the operation of *every part of the law*, a decked boat without masts, and a masted boat without decks, however employed in the harbor of a town or city. From which it may be inferred that a boat without masts or deck is within the law, and may be enrolled. But I regard this as a misapprehension of the design of that section. Within the harbor of a town or city, such as New York for instance, and Philadelphia, boats and lighters are necessary for the transportation of merchandise, *foreign* as well as domestic, from place to place, within the same district, and possibly from one district to another. In a large sense, such boats may be regarded as performing an act of trading, as often as they are so employed, and as going from place to place in the same district when they go from New York to Brooklyn or Staten Island, or from Southwark to Kensington. To prohibit their use in this way, would be to deprive the trade of a city of an essential accommodation: and it would be prohibition if they were exposed either to forfeiture or to foreign duties, if found so trading without enrolment and license. The section means therefore, to exempt boats so employed with masts only, or with decks only, from the operation of the act altogether. It does not imply, that such boats, and still less that boats without either masts or decks are entitled to certificates of enrolment, but it exempts boats with one only of the qualifications, from the penalties of the law, if their employment be thus limited. It implies rather that boats without either masts or decks, are not within the act, by excepting boats that are only masted or decked, and not both, as not being within the operation of any part of the act.

"It being clear then, according to my opinion, that a canal boat such as I have described, is not within the act entitled to enrolment, as wanting the essential qualifications required by law, the next inquiry is whether such a boat is made incapable by law of the use to which it is applied in the carrying of coal in the manner stated from district to district, or from place to place within the same district.

"And this it will readily be seen is a question of great importance; for if such boats have not the legal qualifications for enrolment and license, they cannot be enrolled and licensed; and if without enrolment and license they cannot be used in the manner described, the carrying of coal from Bristol to Philadelphia, or to New York, through the Delaware and Raritan canal, is almost necessarily destroyed, for it can hardly be carried in any other boats. If they cannot carry it, there must be transshipment into an enrolled vessel at Bristol, and if the enrolled vessel cannot pass through the Delaware and Raritan canal, there must be another transshipment at Bordentown, and again at Brunewick. Canals for the transportation of coal may be regarded as almost superseded by the interpretation.

"The impediment to the use of these boats in the manner stated, if found anywhere in the act, is to be found in the sixth section, which enacts that every ship or vessel of twenty tons and upwards found trading between district and district, or between different places in the same district, without being enrolled or licensed, or if less than twenty and not less than five tons, without a license, if laden with goods the growth or manufacture of the United States, distilled spirits excepted, shall pay the same fees and tonnage in every port of the United States where she may arrive, as ships or vessels not belonging to citizens of the United States; and if she has on board foreign goods, etc., or distilled spirits, *the ship or vessel, together with her tackle, apparel, and furniture, and the lading found on board, shall be forfeited.*

"The force and effect of the prohibition lie in the words, *every ship or vessel found trading*, etc. The penalty can attach only to such a boat as is a *ship or vessel*, within the meaning of the act, and is *found trading* in the manner restrained or prohibited by the act.

"Now I apprehend, in the first place, that such a canal boat as has been described, is not a ship or vessel in the sense of the act. She has hardly any more of the attributes of a ship or vessel, in either commercial or common language, than a raft of logs on the water. Boards might be placed upon such logs, and coal might be placed upon the boards—and the whole might be moved by the same power that moves such canal boats. The circumstance of the raft's containing or holding coal, and being moved upon the water, would not make it a ship or vessel in the sense of the act, though in a very general sense it might be regarded as a vessel. The canal boat described is a series or succession of connected boxes, which, whether separate or united at the hinges, is incapable of coasting, either on the sea or in a river, or of being moved by any power within itself. It has no independent or internal capacity whatever, except that of holding the coal. Its practical use, its practical existence indeed, is as an adjunct to something else. It cannot be conceived of as a practical instrument of any kind, except in connection with something external, that is to say, some external animal power on the shore, or some external wind or steam power on the water. The act cannot be understood by its general language to comprehend such a thing. The policy of the law in regard either to ships or seamen cannot be understood to embrace such machines as these, or such persons as are employed to drive the horses or mules, or to attend to mere laborers' duty on board. No one interest of either shipping or seamen can be considered as involved in them.

"But the material consideration remains; and that is a consideration which opens a view of the subject which shows both practically and legally that these boats are never in the predicament which brings on the penalty of the law.

"While they are within the canal, and are towed by a horse, it is understood that, whatever may have been the doubt at one time, it has long been the settled understanding, that the enrolment law takes no cognizance of them. It is only when they become an adjunct to a steam-tug, that the lawfulness of their employment is questioned.

"It is obvious that the act of Congress, in all its provisions, has reference to separate, unconnected, independent ships or vessels, moved or propelled by a power within themselves, and trading from district to district, or between different places by their own capacity. The ship or vessel is always spoken of in this character. She is represented as the acting, moving, trading, and transgressing body; and no one can doubt that this was the only acceptation in which the words *ship or vessel found trading, from district to district*, could have been received at the passage of the act.

"A scow or boat drawn by another boat, and depending wholly upon it for motion and change of place, is not such a ship or vessel. For all purposes of trading, as well as for change of place, the acting, moving, trading, and transgressing body, is the vessel that moves, and the canal boats only as part of her. If the moving or propelling boat is moving, and trading in violation of the law, the penalty is incurred; but if her moving and trading are lawful, the manner in which she transports cargo does not make her trading unlawful.

"If the steam-tug herself is not qualified to carry on such trade from district to district, or between different places in the same district, the law is violated by her. But if she is so qualified, then no offence is committed, for in fact, as well as in law, it is the steam-tug that is found trading, and not the boxes or boats that contain the coal. The law regards the ship or vessel as an offending agent—as a body that by her own capacity carries on the trade—and if she is a mere scow or floating box, attached to another vessel that pulls or moves her, her character is lost in that of the moving and acting vessel that carries her along.

"Put the case that a steamboat has a constant attachment to her sides, of two such boats carrying coal or other merchandise—can it be doubted that the steam-tug is the trader—and that her papers protect the trade?

"If unlawful trade is carried on with, or from, the boats, can it be doubted that the bond given upon the enrolment of the steamboat, to secure the United States against her being employed in an unlawful trade, is forfeited?

"And it is this that constitutes the security of the government against unlawful trading by such boats; that they are a part, or adjunct of the vessel that navigates them, and as much a part of her, as her own boats during the whole voyage from beginning to end—for they are connected with her from the moment they are attached to her, and are incapable of motion to or from different districts, or different places in the same district, without her.

"If the steam-tug is not the vessel found trading, then she would not

be so, if she placed merchandise in her own boat, and towed it at her own stern ; and if such canal boats are to be regarded as found trading, then the boat of the steam-tug, if laden, would be so regarded, and the bond of the steamboat would not be answerable for any unlawful trading with or from the boat. Such a view of the act cannot be defended. There is no law that compels a coaster to carry her cargo in her hold. She may carry it on her deck. She may stow it in her boats on deck. If necessary, or convenient, she may tow her boat with cargo in it. Whatever she tows and moves from district to district, or between different places in the same district, is her trading. If lawful to her, it is lawful to the goods she carries, and to the boats in which they are carried. If unlawful to her, her bond is forfeited.

“Again, unless some distinction is made in behalf of open boats, not decked, in carrying coal from district to district, when drawn by another boat, I know not how the most ordinary intercourse between different districts on the same river is to be carried on. From Bristol, in Pennsylvania, to Burlington, in New Jersey, coal must be transhipped at Bristol, into an enrolled coaster, and carried under deck to Burlington, on the opposite side of the river. I think it cannot be protected in the open boat, under the section which exempts from forfeiture boats employed in the harbor of a city or town. The coal boats are not so employed ; and the harbor of Bristol is not the harbor of Burlington—nor vice versa. The evils of the contrary construction seem to be immense.

“After careful consideration of the case, under the acts of Congress, I am of the opinion that the boats in question cannot be legally enrolled and licensed ; and that, whether in a canal, pulled by horse or mule, or on tide-water, or in an open river or bay, attached to a steam-tug which draws them with their loading of coal, they are not in violation of law, nor is the law violated in any way, in their being drawn from district to district, or between different places in the same district, by a steam-tug, if the steam-tug herself is enrolled and licensed to carry on the coasting trade.”

Philadelphia, May 13, 1845.

HOR. BINNEY.

“A suggestion has been made by one of the managers of the company, which, as an illustration of part of the preceding opinion, appears to have great force. The penalty under the sixth section for trading with domestic produce, is the payment of the same fees and *tonnage* as ships or vessels not belonging to the United States. But the tonnage is matter of admeasurement depending on a deck. How, then, can the penalty be applied to an *undecked* boat? This also shows that Congress did not mean to include such a boat within the prohibition.”

Philadelphia, May 14, 1845.

HOR. BINNEY.

“Philada., 14 May, 1845. I fully concur in the foregoing opinion of Mr. Binney.”

J. K. KANE.

“I do not doubt that the floating coal-chests or boxes used on the Lehigh and Delaware Canals, and particularly described in the opinion of Mr. Binney, would be embraced in the general phrase “*vessel*” employed in the repealed act of Congress of the 1st of September, 1789.

and in the subsisting act of the 18th of February, 1793, relating to the coasting trade. Their rough and primitive character, and their being without masts, or decks, or keels, or rudders, could not withdraw them from the comprehensiveness of that term.

"Nor do I doubt that such vessels, *although unprovided with a motive power within themselves*,—being without sails, or steam, or even oars or pushing poles, might, nevertheless, if dragged from one side of a river in one collection district, to the other side, and into a different collection district, by means of open wherries or batteaux, or by long ropes, as is still common with ferry boats or scows, fall within the general scope of those acts of Congress, if otherwise liable to do so.

"Yet I am clear in the opinion, that by these laws, the enrolment and licensing are mere modes of receiving particular privileges and immunities to certain descriptions of American vessels—not to *all* American vessels—and that these floating coal-chests or boxes do not, and really cannot, come up to the requirements on which only they could be entitled to enrolment and license, or be held subject to the fees and tonnage of foreign vessels. These requirements are fully adverted to by Mr. Binney, or I would repeat them."

17th May, 1845.

G. M. DALLAS.

Before and after the date of these opinions, canal boats of other kinds, *with motive power of their own*,—sails, oars, or steam,—were also used for transporting coal and other cargoes through canals, and from thence, through navigable waters, to market. In the Delaware and Raritan Canal, in 1843, four canal boats with sails, and four others propelled by steam, were thus in use. In the slack water and canal navigation of the Connecticut, small steamers had been previously, and were afterwards used; and on the State canals of New York, steamers have since been used. Some of the boats, large and small, drawn by horses through canals, have always been provided with oars for use after leaving the canals. The number of such boats with oars has been reduced since the commencement of the use of steam-tugs.

An act of 20th July, 1846 (9 Ll. U. S. 39), "to exempt canal boats from the payment of fees and hospital money," was in the words, "The owner or owners, master or captain, or other persons *employed in navigating* canal boats without masts or steam-power, now by law required to be registered, licensed, or enrolled and licensed, shall not be required to pay any marine hospital tax or money; nor shall the persons *employed to navigate* such boats receive any benefit or advantage from the marine hospital fund; nor shall such owner or owners, master or captain, or other persons, be required to pay fees or make any compensation for such register, license, or enrolment and license; nor shall any such boat be subject to be libelled in any court of the United States for the wages of any person or persons who may be employed on board thereof or in *navigating* the same." And all acts, etc., repugnant to this act, were thereby repealed.

"An act to regulate the admeasurement of tonnage of ships and vessels of the United States," was passed on the 6th May, 1864 (13 Ll. U. S. 69). In section third of this act, the phrase, *open vessel*, is used to designate a vessel without a deck. The section prescribes the man-

ner of ascertaining by admeasurement, the register tonnage of vessels with a deck or decks, and also provides for ascertaining the tonnage of open vessels by admeasurement. Section fourth limits the charge for the measurement and certifying of tonnage, so that it shall not exceed one dollar and fifty cents for each transverse section under the tonnage deck, and three dollars for measuring each between decks above the tonnage deck, and one dollar and fifty cents for each poop, or closed in space, available for cargo or stores, or for the berthing or accommodation of passengers, or officers and crew, above the upper or spar deck. The act contains no express provision for any charge or compensation whatever, as to open vessels. Section fifth is in the words: "The provisions of this act shall not be deemed to apply to any vessel not required by law to be registered, or enrolled or licensed, and all acts, or parts of acts, inconsistent with the provisions of this act, are hereby repealed."

The concluding clause of the act of 3d March, 1851, limiting the liability of ship-owners (9 Ll. U. S. 635, 636), provides that the act shall not apply to the owner of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation.

The revenue act of July, 1862, S. 15 (12 Ll. U. S. 558), imposed an additional tonnage duty on all ships, vessels, or steamers, entered at any custom house in the United States, from any foreign port or place, or from any port or place in the United States, or belonging wholly or in part to subjects of foreign powers, provided that the tax or duty should not be collected more than once in each year on any ship, vessel, or steamer, having a license to trade between different districts of the United States. The internal revenue act of 30th June, 1864, sec. 103 (13 Ll. U. S. 275), imposed a duty of 2½ per cent. upon the gross receipts of every railroad, canal, steamboat, ship, barge, canal boat, or other vessel, or any stage, coach, or other vehicle engaged or employed in transporting passengers, or property for hire. The amendatory act of 3d March, 1865, s. 4 (Ib. 493), increased the tonnage duty still further; and exempted the receipts of vessels paying tonnage duty from the tax of 2½ per cent. The ninth section of the internal revenue act, of 13th of July, 1866 (14 Ll. U. S. 136), amended the 103d section of the act of 1864, by striking out all after the enacting clause, and substituting enactments imposing a tax of 2½ per cent. on the gross receipts from passengers and mail carried by railroad, canal, steamboat, ship, barge, canal boat, or other vessel or stage, coach or other vehicle, with incidental regulations, and with certain exceptions and qualifications. It was further provided, that all *boats, barges, and flats, not used for carrying passengers, nor propelled by steam or sails, which are floated or towed by tug-boats or horses, and used exclusively for carrying coal, oil, minerals, or agricultural products to market*, should be required hereafter, *in lieu of enrolment fees or tonnage tax*, to pay an annual special tax of five dollars for each boat of a capacity exceeding twenty-five, and not exceeding one hundred tons, and ten dollars for each boat of greater capacity. This proviso is repealed by the act of 14th July, 1870 (see post). Section thirty-third of an amendatory act of 3d March, 1867 (14 Ll. U. S. 484, 485), was in the words: "the tonnage duty now

imposed on all ships, vessels, or steamers, engaged in foreign or domestic commerce, shall be levied but once within one year; and, when paid by such ship, vessel, or steamer, no further tonnage tax shall be collected within one year from the date of such payment."

An act further to prevent smuggling, etc., passed 18th July, 1866 (14 Ll. U. S. 178), section 1st, enacts that, *for the purposes of the act*, the term *vessel*, whenever *therein used*, shall be held to include every description of water-craft, raft, vehicle, and contrivance, used, or capable of being used, as a means or *auxiliary* of transportation, on or by water; and the term *vehicle*, to include every description of carriage, wagon, engine, car, sleigh, sled, sledge, hurdle, cart, and other artificial contrivance used, or capable of being used, as a means or auxiliary of transportation on land. Section 28th enacted, that all vessels, which, under the provisions of the above mentioned 15th section of the act of 14th July, 1862, and 4th section of the amendatory act, of 3d March, 1865, were exempted from paying tonnage duties more than once in a year, should pay the same at their first clearance in each calendar year; provided, that all licensed, and enrolled and licensed vessels, should pay the duty when taking out their respective enrolments or licenses, if the same had not been previously paid; and provided further, that nothing in the act should be construed to prevent customs officers from collecting such tonnage duty at the entry of any vessel during the year, if not previously paid; and provided further, that all vessels, which were subject to enrolment or license, should thereafter be liable to the payment of the fees established by law, for services of customs officers incident thereto.

The 25th section of the act of 14th July, 1870, to reduce internal taxes, etc. (16 Ll. U. S. 269), so amended section 15th of the act of 14th July, 1862, and section 4th of the amendatory act of 3d March, 1865, that no ship, vessel, steamer, barge or flat, belonging to any citizen of the United States, trading from one port or point within the United States, to another port or point in the United States, or employed in the bank, whale, or other fisheries, should thereafter be subject to the tonnage tax or duty *provided for in those acts*; "and the proviso in section 103d" of the act of 30th of June, 1864, "requiring an annual special tax to be paid by boats, barges, and flats," was repealed.

The intended subject of this repeal was obviously the proviso contained in that part of the 9th section of the act of 13th July, 1866, which had been thereby substituted for the 103d section of the act of 30th June, 1864.

The effect of the act of 1870 was to exclude wholly the application of previous and existing internal revenue laws to the boats in question.

The district attorney, Mr. A. H. Smith, and the assistant district attorney, Mr. Valentine, contended, that the act of 1846, and the tonnage register act of 1864, were in effect legislative declarations that the act of 1793 was applicable to such boats, that the enactment in the revenue law of 1866, imposing a special tax, in lieu of enrolment fees or tonnage tax, was a legislative declaration, that such boats had been liable to such fees and tonnage tax, and that the repeal of the latter act in 1870 revived this two-fold liability. They contended, therefore, that if there had otherwise been doubt of the applicability of the act of 1793, the doubt was removed by the subsequent legislation.

Mr. Gibbons, for the claimant, denied the applicability of the act of 1793, to such boats. He relied upon reasons and arguments contained in the above opinions of counsel. He also contended that the act could not be understood as applicable to vessels of a kind unknown when it was passed; that the transportation of coal in these boats was not a trading within the meaning of the act; that the act of 1846 left open to future decision the question of the effect of the former act, exempting the boats from fees and charges, whether otherwise liable to them or not; that the tonnage act of 1864 did not annul the exemption, or create any new liability of such boats.

CADWALADER, J.—The word “trading” may have meanings which vary with its different applications. In laws concerning navigation, every vessel carrying a cargo or passengers may in general be considered as trading. Boats of the kind in question, though, in the language of the revealed proviso of the internal revenue act of 1866, “used exclusively for carrying coal, oil, minerals or agricultural products to market,” would be considered as *trading*, within the meaning of the act of 1793, if it were otherwise applicable. (See 9 Wheaton, 215–219.)

I think that the act of 1793, if the 37th section had been omitted, would have been applicable to everything afloat, navigable by motive power of its own, and transporting a cargo, whether the motive power were that of oars, that of sails, or that of steam, whether the vessel were of a kind which was known at the date of the act or not, and whether she had a deck or was open. If a more limited meaning were attributed to the phrase *ship or vessel*, purposes of the act might be frustrated. The 37th section shows that an express exception was considered necessary, in order to prevent the act from being applicable to boats of more than five tons, moved only by oars. If the section had been omitted, there would be no more reason to exclude steamers from the application of the act of 1793, than to exclude vessels propelled, in the primitive manner, by oars, of whose use the frequency has been diminished by the innovation of steam-tugs. (See 9 Wheaton, 219, 220.)

Here, two alternative and very different interpretations of the 37th section, must be considered. The section, according to one interpretation, excludes from the operation of every part of the act, all boats or lighters whatsoever, which are not masted; and, of boats and lighters which are masted and not decked, excludes only such as are employed in the harbor of any town or city. According to the other interpretation, the qualification of being *employed in the harbor of a town or city*, extends to all the subjects of the section; so that the exception from the operation of the act includes no boat or lighter not masted, unless it is employed in such a harbor.

According to the former interpretation, the boats in question, as they have no mast, could not be subjects of the act of 1793, for any purpose. According to the latter interpretation, the question of the applicability of the act cannot thus be summarily disposed of.

In deciding between the two interpretations, of the 37th section, it must be remembered, that punctuation of a statute forms no part of it, and is not recognizable as controlling its interpretation (4 D. & E. 65, 66, Law Rep. 3 Com. Pls. 519, 521, 522; 9 Gray, 385; and see 11 Peters,

54). But it is necessary to find, if possible, a meaning and purpose for every word of the section.

If the first of the interpretations be adopted, every word will have its fair and full effect. "Nothing in the act" will then "be construed to extend to any boat or lighter not being masted—or, if masted, and not decked, employed in the harbor of any town or city." But, according to the second interpretation, the word *and* has no effect, which is not repugnant or embarrassing.

Therefore, if the question were new, I would have no difficulty in deciding that the 37th section of the act of 1793 excluded the boats in question from the application of the act of 1793, if it would otherwise have been applicable to them.

But the second interpretation of the section appears to have been so generally adopted, though I do not see for what sufficient reason, that I am constrained to doubt the correctness of my opinion upon the point. Therefore, as I am also of opinion that, although the second interpretation were the correct one, the conclusion would nevertheless be the same, I will, in what follows, consider the question of the applicability of the act of 1793 to these boats upon the assumption, which seems to have been so general, that the 37th section does not apply to them, but applies to such boats only as are employed in the harbor of a town or city.

I think the act inapplicable to the boats in question, because they are without oars, or masts, or steam, or motive power of any kind which can be called their own. For this reason, they are not included in the ordinary general description, of *ships or vessels* which is the *only designation* contained in the act.

A vessel of private ownership represents an organization which is part of the social system of the country to which she belongs. In this representative character, she has legal attributes and legal rights, and may incur legal responsibilities, however and by whomsoever she may be navigated (7 Wallace, 53, and see 21 Howard, 191, 192). The sole purpose of this organization is her navigation, and its incidents. That which cannot be made navigable through any internal command of a propelling force, cannot, in a strict sense, be, nautically speaking, a vessel, though she may be called such for the convenience of identifying her with what was once navigable, and may, in some cases, become so again. This remark applies variously under different circumstances. It may apply to a vessel when she is laid up in a port, at home or abroad, or when she is an absolute wreck, whether stranded or afloat; and may have a qualified applicability to a vessel's own boat when it is towed astern. The case of a sailing vessel which is lashed to the side of a steam-tug is also temporarily an example. The Supreme Court have said, that "whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessarily, or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage, through the fault of those in charge of the vessels, must, under such circumstances, look to the tug, her master or owners, for any injuries that vessels or cargo may receive by such means." (24

How. 122.) When the towage is by a hawser, the vessel towed is not liable except so far only as her movements are at her own command, and she is in fault, or negligent in respect of them. (21 How. 193, 194.)

The reason is much stronger, and its application more simple, in the case of the boats in question. They are absolutely, at all times, without motive power at their command. Though ordinarily called *boats*, they have been also more properly designated as floating trunks or boxes. They are not subject to admiralty and maritime jurisdiction. Judge Nelson was inclined to this opinion. He thought that they were not ships or vessels, when upon public navigable waters, because they had no power as respects navigation upon such waters. (4 Bl. C. C. 205, A. D. 1858.) The intimation was extra-judicial, the decision upon the merits being against the libellant. There had, however, been a previous decision of Judge Grier against the admiralty jurisdiction. He said that such boats were not ships or vessels in the maritime sense of the term; and added, that they *do not take out a coasting license*. (3 Wall. Jr., 53, 55, A. D. 1855.) This dictum is in point upon the present question. But it will be necessary to consider the question upon original grounds, because the case before Judge Grier was that of one of the canal boats on the Monongahela, which are described in the report somewhat differently from the description of the boats in question here; and also because laws concerning navigation may apply incidentally to what are not subjects of admiralty and maritime jurisdiction.

Certainly, however, such a boat as is here in question is not a *vessel* in any sense in which the word is ordinarily used in laws concerning navigation. In the act of 1851, limiting the liability of ship owners, the general phrase, ship or vessel, must be understood as applicable only to a vessel responsibly navigated. Therefore, if the concluding provision, that the act shall not apply to the owner of any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation, had been omitted, the former general phrase, if applicable to canal boats, would not have included any others than such as have sails, oars, or steam power of their own. To make the word vessel, or boat, in an act of legislation of any kind, applicable to the boats in question, superadded words of special description have been considered necessary. Thus, in the repealed proviso of the internal revenue act of 1866, they were described as *boats not propelled by steam or sail, which are floated or towed by tug-boats or horses*. In the first section of the act of the same year against smuggling, it was thought necessary to provide expressly that *for the purposes of that act* the term vessel should be held to include every description of watercraft, raft, vehicle and contrivance used, or capable of being used, as a means or *auxiliary* of transportation, on or by water. This amplified form of description would not have been adopted, if the word *vessel*, unexplained, had been deemed of co-extensive import. If the description, thus amplified, includes the boats in question for the purposes of that act, they are so included by force of the phrase *means or auxiliary of transportation on or by water*.

Vessels to which the act of 1793 applies, and which, on compliance with its requirements, are entitled to the privileges and exemptions conferred by it, must be owned and commanded by citizens of the United States. Before any boats like those in question were known, an act of

Congress of 12th March, 1812 (2 Ll. U. S., 694), allowed steamboats employed only in rivers or bays of the United States, owned wholly or in part, by resident aliens, to be enrolled and licensed as if they belonged to citizens of the United States, according to, and subject to, all the conditions, limitations and provisions contained in the act of 1793. The tugs which tow the boats in question may thus be owned by resident foreigners. The enactment of 1812 was not mentioned in the argument of this case. But my attention was drawn to the act by an observation of counsel, that a great many of the boats in question are owned, or in the charge of resident aliens. If such a fact has been wholly disregarded for the greater part of half a century, the most rational explanation is, that the exemption of the steam-tug, which alone has the motive power, has been regarded as including that of the tow which has no independent navigability. The suggestion that the character and amount of the fees and charges for transporting coal, or anything else, from the interior of the country to a domestic market by towage, may vary as the Irishman, German or Englishman owning the tow or having charge of it, has, or has not, become a naturalized citizen, seems absurd.

If the foregoing views are correct, the words of the act of 1793 do not apply to canal boats having no motive power of their own, but, according to the second interpretation of the thirty-seventh section, apply to canal boats of a certain tonnage, which, though without masts or steam power, have oars. That the latter boats, when in rivers and bays, have the command of their own movements, with consequent responsibilities, might be a sufficient reason, that they should be requirable to be licensed, or enrolled and licensed. But that they should incur the incidental burdens of coastwise *maritime* navigation was nevertheless very incongruous to the nature of inland navigation. This may explain the purpose, or one of the purposes of the act of 20th July, 1846. It may have been a reconciling purpose to remove this incongruity, and yet fulfil the exigency of the act of 1793, by relieving canal boats with oars of all maritime burdens without dispensing with the requirement of a license or enrolment and license. Another purpose of the act of 1846 may have been to meet provisionally in like manner, any future decision of the case of canal boats like those now in question, which had then been a disputed case. If this two-fold purpose existed it would have been attained by defining in the act, the subjects of it as "canal boats without masts or steam power," and exempting them from the *peculiarly maritime* burdens of hospital dues, fees and charges of registering, enrolling or licensing, and subjection to libels for wages. The boats thus exempted, whether provided with oars or not, were according to this interpretation, such boats only as were then, "by law, required to be registered, licensed, or enrolled and licensed."

The opinions of counsel which have been mentioned in the course of the argument, and the accompanying letters from the officers of canal companies, were filed in 1845, in the treasury department, where they now remain. There can be little doubt, if any, that these papers were before the eyes of the framer of the act of 1846. It is therefore, extremely probable that he had in view the two-fold purpose which has been suggested. But, unless the words of the act sustain the consequently suggested interpretation, it cannot be adopted. The intention of

a lawmaker is to be legally deduced, not from what may thus have been his probable purpose, but from the meaning of the words which he has used. Here I doubt greatly whether the meaning of the words authorize the suggested interpretation of the act of 1846.

In the contexts of this act, wherever the phrase *canal boats without masts or steam power* occurs, it is never used otherwise than in connection with *persons employed to navigate them*. It is true that the former expression is once used with a disjunctive relation to the owners. But it is also twice used without any possibility of such an alternative relation. The words "nor shall the persons *employed to navigate* such boats receive any benefit or advantage from the *marine hospital fund*," and the provision against libelling any such boat for the wages of any person or persons employed on board or in *navigating* her, are thus applicable to such canal boats only as have oars. Therefore, I incline to the opinion that the application of the words of the act is limited to such as have oars. The provision against libelling for wages would otherwise be insensible, as well as the provisions concerning persons navigating the boats. The only doubt is, whether the act applied likewise to the boats in question. This doubt is, to say the least, very great.

The point is quite immaterial, if I am right in thinking, as I do, that there is no intention apparent in the act of 1846, to determine to what boats the act of 1793 applied. It was, however, in the argument, assumed that the act of 1846 indicates a belief on the part of Congress, that all canal boats without masts or steam power, including the boats in question, were, by law, required to be registered or licensed, or enrolled and licensed; in other words, a belief that the act of 1793 applied to all such boats. Though I think the assumption erroneous, it will not be amiss to consider whether, if the words of the act of 1846 imported such a legislative belief, they would affect the decision.

If such were the meaning of the words they would, as we have seen, misconstrue the act of 1793. Words of legislation importing an erroneous construction of a pre-existing statute have not the effect of a law establishing the construction as valid for the future, unless they also import a declaratory or other enactment. This rule, however well established, is very seldom applied, because there is no invariable form of a declaratory statute, and the legislature may at pleasure enact how a prior one shall be construed in future. We have also constant experience that successive statutes on the same subject may be read in connection with one another and harmonized, as if they together constituted one and the same law. These explanations and qualifications of the rule do not abrogate it. My predecessor, Judge Hopkinson, stated the rule too broadly perhaps, when he denied that a legislature had a right to impose upon a court their construction of their statutes previously passed. He said that it was for the court to construe the law; but added that it was the right and duty of a judge to look into all the statutes made upon the same subject, to discover what was the intention of any of their provisions, thus to ascertain the true meaning and construction by his own judgment, and not by any subsequent legislative declaration of intention or construction (8 Peters, Appx., 734). The rule, and a proper qualification of it, were stated with precision by Chief Justice Marshall. He said that a mistaken opinion of the legislature concerning the law, does not make the law, but that if the mistake is manifested in words

competent to make the law in future, there is no principle which can deny them this effect, and that a law, not in form declaratory, though inoperative on the past, may act in future, by expressing the sense of the legislature on the existing law as plainly as a declaratory act. (12 Wheaton, 148, 149.) In an English case, *Le Blanc, J.*, said, that a court, if clear in their construction of a statute, would be bound to give it effect, though they should be of opinion that an erroneous construction had been put upon it by subsequent statutes (16 East, 326). In that case, the framers of a statute had, in reciting a prior statute, misconstrued it. Lord Ellenborough said that he might be under a compulsion, through subsequent statutes, to put a perverse and unnatural interpretation on the original statute, but that he would endeavor, as far as he could, without violating the fair rules of construction, to maintain the integrity of the original text, unvitiated by subsequent misconstruction, if he might so say. (Ib. 319, 320.) After stating and explaining the misconstruction, which consisted in misreciting the effect of the original statute, he asked whether the framers of the misconstruing statute had imposed upon the court, *by any enactment*, the necessity of adopting that which he must assume to be their error if the words of the prior act were intelligible in themselves. In his opinion the recital in the subsequent act could not overrule the plain intelligible sense of the prior one (Ib. 324, 325). Where a perpetual statute, English or colonial, was, through legislative inadvertence, continued in force by the words of a subsequent statute, until the end of the legislative session, or for two years, the perpetual statute was not abrogated, but continued in force after either period limited. (Hobart, 215, *T. Ray*, 397.) An act of the Legislature of Pennsylvania subjected all real estate within one of the corporate municipalities of a county to a lien for assessments, to which all real estate in the county had, by a former act, been made subject. The Supreme Court of the State said that the passing of the subsequent act, at most, only proved that the legislature were not then aware that the assessments had been made liens by the previous act; and added that it could not be sustained for a moment, that the legislature's mistake or misapprehension of the law in this respect would make it different from what it really was. (5 Rawle, 317.) A series of English statutes prohibiting and restricting commerce, etc., with enemies were forensically reviewed in 1794. (6 D. & E. 38-44, 47-50.) Many of these enactments indicated that the parliament conceived the prohibitions necessary in order to make such trading and intercourse illegal. Most of the legislative provisions on the subject were otherwise unnecessary. But they were wholly disregarded in this respect by decisions of the King's Bench (6 D. & E. 23, 35; 8 D. & E. 548, 561), and had previously been so disregarded by the Court of Admiralty (1 Rob. 196, 220).

If the law of 1846 had contained words of equivalent effect with a recital that the boats in question were included in the law of 1793, the only enactment in the law of 1846 would be the concession of an exemption from certain supposed liabilities. Such a legislative concession would not constitute an enactment including the boats in that description, or otherwise enlarging the effect of the act of 1793. The authorities which have been cited, therefore, show that the decision of this case cannot be affected by the act of 1846.

It is not necessary to consider the tonnage measurement act of 1864, because the 5th section excludes the application of the act to any vessel not required by law to be registered, or enrolled, or licensed.

As to every question in this case, the act of 1870 has excluded wholly the application of the internal revenue laws of 1862, 1864, 1865 and 1866. If they had continued in force, the only question which would have required attention, has, in principle, been disposed of in considering the act of 1846. This question would have arisen upon the words "in lieu of enrolment fees or tonnage tax," in the proviso contained in that part of the 9th section of the revenue act of 1866, which was thereby substituted for the 103d section of the revenue act of 1864. If these words indicated a legislative belief that the boats in question were subject to the payment of enrolment fees or tonnage tax, they were words, not of enactment, but recital, and misrecited the existing law. But the repeal of the proviso deprives the question of any importance, which might otherwise have been attributable to it.

The only act of Congress, which has not been sufficiently considered, is a provision of the 28th section of the act of 1866, against smuggling. The provision is, that all vessels, which were subject to enrolment or license, should thereafter be liable to the payment of the fees for services of customs officers, incident thereto. This provision, considered as an isolated enactment, would be of no significance in the case. If, as to those canal boats which are included in the description of *vessels*, in the act of 1793, the provision repealed the exemption from certain maritime charges, of which such canal boats had been relieved by the act of 1846, the process of legislation to deprive them of the exemption was indirect, and the exposition of the purpose to do so was obscure. But, if such was the legislative intention, it could not extend beyond the subjects of the former exemption; and, if I have rightly interpreted the act of 1846, which conceded the exemption, the act applied only to such canal boats, without masts or steam power, as have oars.

The point of inquiry is, however, different. The question is upon the effect of the first section of the act against smuggling on this provision of the 28th section. The first section, which has already been quoted, extends, for the purposes of the act, the meaning of the word *vessel*, so as to make it, for such purposes, include every description of watercraft and means or auxiliary of transportation on or by water. The title of the act is, "An act further to prevent smuggling and for *other purposes*." The provision of the 28th section applies to all vessels subject to enrolment or license; and the argument for the United States, if I rightly understand it, is, that the provision must be read as if its words were—all vessels, including every description of watercraft and contrivance used or capable of being used as a means or auxiliary of transportation on or by water, which are subject to enrolment or license, shall hereafter be liable to the payment of the fees established by law for services of customs officers incident thereto.

If this were the actual phraseology of the 28th section, it would have no effect beyond subjecting to payment of the fees, all such watercraft, etc., as were already subject to enrolment or license. Whether it would be wise or unwise to abrogate thus far the exemption conceded in 1846, the purpose to do so would be intelligible. But the phrase, *purpose of*

this act, in the act of 1866, would be extravagantly extended beyond its fair import, if made to enlarge inferentially the purposes of other statutes whose provisions may be supposed incidentally in question.

To effectuate the legitimate purposes of the act against smuggling, boats, trunks or boxes, like those in question, may, in certain cases, be forfeitable, as appendages of the tug which tows them, for her violations of penal enactments. Whether, in other cases, they may, when themselves peccant receptacles of smuggled property, or when otherwise used unlawfully, be forfeitable independently of such tug, is an inquiry foreign to the question whether they are, when towed by her, subject to distinct enrolment or licensing under the act of 1793. The purpose of the first section of the act of 1866 was merely to prevent its own provisions in subsequent sections, from being liable to evasion through any mis-description, or doubtful description of watercraft. It was no purpose of the act to duplicate requirements of the act of 1793, by requiring enrolment or license of the tows which are without motive power, and of whose tug a license was already required.

As these tows, though innavigable, float when detached from their tug, legislation requiring them to be named, and enrolled, or licensed, might be useful to prevent smuggling, or facilitate its detection. But the inference of such a motive of legislation, from words of enactment imposing charges which are properly incidental to such navigation only, as, whether coastwise or foreign, is peculiarly *maritime*, would seem irrational.

Libel dismissed.

[*Leg. Int.*, Vol. 29, p. 284.]

CASE OF THE SCHOONER WREATH.

Allowance of counsel fee under special circumstances.

In admiralty before CADWALADER, J., *August 30, 1872.*

Minutes of decree.

The questions which are the subject of disagreement having been argued by counsel, the court unhesitatingly allows the costs, amounting to \$334.01.

As to the so-called charges of counsel, they are not in this judicial district, allowable in ordinary cases. In cases in which a common interest has been promoted by services which a mere selfish consideration of the client's interests would not have induced an advocate or proctor to render, the charge of a part or even the whole of the compensation of counsel, may, however, sometimes be proper (9 Wheaton, 179). The allowance, when made, is on exceptional and extraordinary reasons. In this case the reasons exist, and are sufficient. The only doubt is, whether the whole or a part only of the amount in question should be allowed. As it is extremely moderate, and an apportionment would be difficult, I allow the whole.

The proceeds of the vessel and amount of the freight not being sufficient to reach any part of the demand of S. C. Loud & Co., whose libel of intervention was filed on the 6th of July last, the validity of this demand as against any present subject of litigation has not been considered.

Bills for towage, \$4; surveyor of port, \$28; hire of chronometer, \$33; H. L. Gregg, \$36.76, having been presented to the clerk, the freight appearing to have been sufficient for their discharge, they are disallowed as claims upon the fund in court, with leave, however, to the respective parties to move the court at any time before final distribution.

The clerk is directed to advertise in two daily papers of general commercial circulation in Philadelphia, and one such paper in New York, that any person having claims upon the proceeds of sale of the vessel must present the same within ten days from the first publication or they will be debarred, etc., such publication to be made twice a week in each paper.

Samuel S. Hollingsworth, Esq., for the libellants.

J. Hill Martin, Esq., for owners of cargo.

[*Leg. Int.*, Vol. 29, p. 226.]

UNITED STATES *vs.* JAY COOKE & COMPANY.

Where an officer of the United States paid a draft upon a forged signature, and more than six years afterwards suit was brought to recover the same from the banker, who had innocently collected the same: *Held*, the action not to be sustained.

This was an action of assumpsit tried November 25, 1871, before CADWALADER, J. The facts were these: an individual representing himself to be Charles M. Colton, Asst. Surgeon U. S. army, placed in the hands of Ira B. M'Vay & Co., bankers of Pittsburgh, a pay-roll for collection, which M'Vay & Co. sent to Jay Cooke & Co., at Philadelphia. The latter firm received the money from paymaster Riche, June 24, 1863, transmitted it to M'Vay & Co., who paid it over to the supposed Colton. The order attached to the pay-roll, and the indorsement were as follows:

"Paymaster Major Taggart, U. S. army, will please pay to Messrs. Ira B. M'Vay & Co., or order, the amount of the within roll.

"CHARLES M. COLTON, Asst. Surgeon U. S. A."

"Pay to JAY COOKE & Co., or order,

"IRA B. M'VAY & Co."

"JAY COOKE & Co."

Some time in the year 1869 it was discovered that the signature of Charles M. Colton was a forgery, and November 6, 1869, suit was brought against Jay Cooke & Co. by the United States, to recover the amount of the pay-roll.

On the trial the learned judge charged the jury that the fact of the forgery was fully established, but that the case did not differ from the familiar one where an individual paid a check on the faith of the signature of the drawer, which subsequently proved to be a forgery. Under the directions of the court the jury rendered a verdict for the defendants.

The counsel for the United States, having moved for a new trial, were heard January 16, 1872, when the learned judge said that there were several interesting points in the case, which might be discussed, but it was only necessary to say that the delay of more than six years which had elapsed was fatal to the claim of the United States—that all the

cases required the utmost diligence on the part of the drawee, a diligence analogous to that required in giving notice of the dishonor of commercial paper. In this case had an individual been the plaintiff, the action would have been barred by the statute of limitations. He therefore refused the motion for a new trial.

John K. Valentine, Esq., and Hon. Aubrey H. Smith, for the United States.

George D. Budd and John Clayton, Esqs., for Jay Cooke & Co.

[Leg. Int., Vol. 29, p. 28.]

THE JULIET C. CLARK vs. S. & W. WELSH.

Freight allowed upon cargo destroyed.

In admiralty. Libel for freight.

The following statement of facts is given by the libellant's counsel.

The vessel was chartered by S. & W. Welsh, for a voyage from Philadelphia to Trinidad de Cuba and return.

By the charter party it was agreed that the vessel was to be provided for the outward voyage with a full cargo or sufficient ballast, and for the homeward voyage a full under deck cargo of sugar or molasses, or both, and the charterers were to pay to the vessel "for outward cargo all foreign port charges at Trinidad, and for homeward cargo forty-six cents for each one hundred pounds of sugar net custom-house weight, and (or) four and three-eighths dollars for each one hundred and ten gallons, gross custom-house gauge, of cask, of molasses delivered, in American gold coin."

The charterers put on board a cargo of staves, etc., and the outward bound voyage was made in safety, and the vessel received her homeward cargo.

On the return voyage, the between deck cargo was forced from its original stowage and a number of the hogsheads were emptied and several of them broken. Twenty-eight hogsheads (two of them in the lower hold) had lost all of their contents, and fifty-four hogsheads were "in staves."

The respondents were unwilling to pay freight on the empty and broken hogsheads, and this action was brought to recover freight on the entire cargo.

Opinion delivered *January 19, 1872*, by

CADWALADER, J.—The interpretation of the contract is to be made with reference to its peculiar subject. The argument for the respondents does not, in this respect, meet the exigency of the question. The question was argued as if molasses were merely to be considered as a liquid liable to extraordinary leakage from fermentation, and the casks were to be considered as merely liable to the consequent loss of contents. This argument overlooks the fact that, in consequence of the liability to such fermentation, the casks are carried by sea with their bungs out. The effect of the voyage is, ordinarily, to empty many of them, and it is known from experience, that, without any extraordinary stress of weather, casks are often turned with the bungs downward, and that when this occurs the position is very seldom, if ever, righted.

The only way, therefore, of obtaining a certain hire for the vessel carrying such a cargo is that which was adopted in this contract; that is, to estimate the freight as if every cask was full, applying the measure to casks which are quite empty as well as to those which are partially so. That this was the purpose of the contract cannot be doubted when the words are properly applied. From a manuscript report of a case before Judge Ware he may be supposed to have decreed full freight upon such an estimate where a loss of the whole contents had occurred from extraordinary perils of the sea. If such were the question here I might perhaps pause before deciding it. But here the loss of contents occurred from no such extraordinary cause.

Decree for libellants with costs.

Messrs. Lane and Roney, for libellant.

John Fallon, Esq., for respondents.

[*Leg. Int.*, Vol. 30, p. 344.]

District of New Jersey.

UNITED STATES *vs.* MEEKER.

Action against surety on a paymaster's bond, where penalty of bond was \$20,000, and jury found verdict in favor of the government for \$25,679.42.

Held, That the plaintiff was entitled to judgment for the penalty (\$20,000) of debt, and for the interest upon that sum in the nature of damages, from the commencement of the suit to the entry of the judgment. The aggregate amount, not exceeding, however, the sum awarded by the verdict.

In debt, on paymaster's bond.

This was a suit against the surety of a paymaster for breach of the condition of his official bond. The penalty of the bond was twenty thousand dollars; but upon the trial, the jury found a verdict in favor of the government in the sum of twenty-five thousand six hundred and ninety-seven and forty-two one hundredth dollars. The question was raised whether the judgment upon the verdict should be for the penalty only (\$20,000), or whether the plaintiff was entitled to have added to this sum, interest thereon in the nature of damages; and if so, whether the interest should commence from the date of the breach of the condition of the bond, or from the time of the demand upon the surety.

The court expressing doubt as to the rule in such cases, it was agreed that the entry of the judgment should be postponed until the parties in interest had opportunity to examine the question.

Opinion delivered October 10, 1873, by

NIXON, D. J.—After a careful examination of the authorities, I am satisfied that the judgment in this case should be entered for \$20,000 (the penalty of the bond) of debt, and for the sum of \$ for damages, being interest on the penalty from the twenty-seventh day of January, 1867, the date of the original writ. That time is fixed for the beginning of interest, because there was no proof of any previous demand upon the surety.

This view, I think, is sustained by the following authorities: 2 Greenl. Ev., § 263; *Long's Administrators vs. Long*, 1 C. E. G. 59; *United States vs. Arnold*, 1 Gall. 360, affirmed by the Supreme Court, 9 Cranch,

104; *Bank of Brighton vs. Smith*, 12 Allen, 243; *Harris vs. Clap*, 1 Mass. 308; *Warner vs. Thurlis*, 15 Id. 154; *Brainard vs. Jones*, 18 New York, 35, and *Lonsdale vs. Church*, 2 Term R. 388.

The earlier and later cases are reviewed, and the whole subject discussed, in *Long's Administrators vs. Long*, by Chancellor Green, with his usual learning, discrimination and skill.

I am aware that the courts in England have been in doubt in this matter, and that the cases of *White vs. Seeley*, Doug. 49; *Wilds vs. Clarkson*, 6 T. R. 303, and *McClure vs. Durken*, 1 East, 436, greatly impair, if they do not destroy, the authority of *Lonsdale vs. Church*, supra.

I have also adverted to the fact that the late Justice McLean, in *Lorenence vs. United States*, 2 McL. 587, while admitting the reasonableness of the rule, that gives interest on the penalty, from the demand upon the surety, or from the breach of the condition, felt constrained by the authority of *Farrar & Brown vs. United States*, 5 Pet. 385, to hold that no more than the penalty could be recovered. But a closer examination of this last case gives force to the suggestion, that what was said upon the question I am now considering, were *obiter dicta*, in nowise necessary for the decision of the point there under consideration.

The court was reviewing exceptions to the form of the judgment—the jury having found for the plaintiff below on the breach assigned, and assessed the damages for the breach of the condition at \$41,000, and the judgment that had been rendered thereon, was “*quod recuperet*”—the damages, not the debt.

All that was needful to be said in such a case was, that in an action for debt, a judgment for damages simply, could not be cured or amended.

Let the judgment be entered in accordance with this opinion.

Keasby, district attorney, for United States.

Magie & Emery, Esqs., for defendant.

[Leg. Int., Vol. 29, p. 383.]

IN RE HENRY M. DUNHAM.

1. When a court of last resort reverses one of its own decisions, the change of the law is retrospective, and makes the law at the time of the first decision, as it is declared to be in the last decision.
2. But the last decision only changes the law as to those transactions that can be reached by it, and in the absence of fraud, no contracts executed are disturbed by such retrospective action.
3. Where a mortgage is satisfied by payment and receipt indorsed, parol evidence of any agreement contradicting the receipt not admissible.
4. Courts will not relieve a party from contract or agreement entered into by mistake, where the mistake is one purely of law.

On petition, etc. Opinion delivered November 19, 1872, by

NIXON, J.—A petition has been filed in this case by the assignees of the bankrupt, asking for an order upon John Aumack, a creditor, to show cause before the court; why he should not refund to the assignees the sum of \$148.41, the amount paid by them to him on the 25th day of March, 1870, in excess of the sum due at that time, upon a bond and mortgage, which he held against the estate.

Aumack was one of the mortgage creditors of the bankrupt. On the 2d of March, 1870, he made proof of his debt with security, claiming that he held a bond of the bankrupt, dated January 18, 1861, for the

payment of \$1000, in one year after date, with interest at six per cent., that the interest due was \$233, that the bond was secured by mortgage upon certain real estate of the bankrupt, and that he was entitled to have the debt paid in gold or its equivalent.

The assignees were at Tom's river, on the 25th of March, 1870, for the purpose of paying off certain preferred claims against the estate; Mr. Aumack presented his mortgage for the payment. After some conversation between him and the assignees, as to whether the debt should be satisfied in gold or not, and to which I shall more particularly refer hereafter, they paid to him in currency the sum of \$1385.16. The amount of principal and interest, at that time due upon his claim, was \$1236.75, the excess of the payment, to wit, \$148.41, was twelve per cent. added for the gold premium, to make the sum received by Aumack equivalent to a payment in gold. One of the assignees then drew upon the back of the mortgage, and Aumack signed the following receipt:

"March 25th, 1870. Received of A. C. McLean and C. Robbins, assignees, \$1385.16, in full satisfaction of the within mortgage; the amount of principal and interest being \$1236.75, and paid in currency at gold value of twelve per cent. premium."

[Signed] JOHN AUMACK.

This settlement was made after the Supreme Court of the United States in *Hepburn vs. Griswold*, 8 Wall. 604, and the Court of Chancery of New Jersey in *Martin's Executors vs. Martin*, 5 C. E. Gr. 421, had decided that the clause in the act of Congress, passed February 25, 1862, making United States notes a legal tender in the payment of all debts, public or private, so far as it applied to debts contracted before the passage of the act, was unconstitutional; and before the reversal of the first-named case, by a majority of the court in *Knox vs. Lee*; and *Parker vs. Davis*, 12 Wall. 457.

It is now contended by the counsel for the assignees, that the interpretation of acts of Congress, by the Supreme Court of the United States, is final, and binds all inferior judicatories, national or State; that the effect of the last decision was to render lawful the payment of all indebtedness, in the notes of the United States, from the 25th of February, 1862, when such notes were made a legal tender for the payment of private debts; and that hence, the assignees may demand and receive back from the creditor, the twelve per cent. premium allowed by them in the satisfaction of the mortgage held by the respondent.

It is undoubtedly true that the law, as to the constitutional effect of all acts of Congress, must be taken from the Supreme Court, and that any change of the law, by the decision of a court of last resort is retrospective, and makes the law to be at the time of the first decision, as it is declared to be in the last decision.

It was so held by the chancellor of this State in *Stockton vs. The Dundee Manufacturing Co.*, 7 C. E. Gr. 56, but with this important qualification, that the last decision only changes the law "as to those transactions that can be reached by it." All contracts that are executed, all matters that are closed by the parties before the change effected by the last decision takes place, in the absence of fraud, are

beyond the reach and influence of any retrospective action of the law caused by such change.

What, then, are the facts of the transaction which is sought now to be opened? Has anything been left by the parties, contingent upon a subsequent construction of the legal tender act?

I have examined the testimony taken, and the fullest import of the proof is, that the assignees understood that they might demand a repayment of the premium, if any change in the views of the court should afterwards take place. There is no evidence that the mortgagee knew of or assented to any such arrangement. There was some talk at the time that, if a rehearing of the case should be ordered by the court, there would perhaps be a reversal of the previous decision, but one of the assignees, who seems to have done the chief part of the talking, admits, upon being recalled, that it is quite probable Mr. Aumack did not hear the suggestion that he would, in any contingency, be called upon to pay back the premium.

But admit that he did hear them. Can the court be expected to get at the intention of the parties from their loose conversations, when they afterwards came to a settlement and reduced its precise terms to writing? *Hunt vs. Rousmanier*, 8 Wheat. 211. The receipt drawn by one of the assignees at the time, and signed by the respondent, is the legal evidence of what the parties agreed to, and did, and that shows that the assignees paid, and that Aumack accepted \$1385.16, in "full satisfaction of the mortgage, the payment being made in currency at gold value of twelve per cent. premium."

The counsel for the assignees, in the argument states, that the receipt was framed to enable the assignees to make reclamation of the gold premium, if subsequent events should favor the demand. If such was their design, they have been unfortunate in the language employed to convey their meaning. No hint is anywhere indicated, that under any circumstances was the settlement to be disturbed. If there had been no change of views in the court respecting the right of the mortgagee to demand gold, and if the premium had advanced to twenty-five or fifty per cent. after the payment of the mortgage, would it be claimed that the respondent could now invoke the aid of this court to compel the assignees to pay to him the advanced premium? And, yet, looking at the terms of the receipt as embodying the contract of the parties, there would be quite as much reason for that as for listening to the assignee's present demand for restitution.

Authorities were quoted upon the argument to show that courts have, and therefore may relieve parties against mistakes arising from ignorance, either of the law or of the facts. But no such ignorance seems to have existed here. There was no lack of knowledge and there was no concealment on either side. Both parties knew what the facts were, what the law had been declared to be, and had equal means of anticipating what it would continue to be. They concluded under these circumstances a settlement, which the court is now asked to open and reform.

But conceding that ignorance did exist, I can find no well-considered case where the court has relieved the party from a contract or agreement entered into by mistake, where the mistake was one purely of law,

although many may be found where such relief has been granted when attended with misrepresentation, undue influence, misplaced confidence, or any badge or indication of fraud. *Lyon vs. Richmond*, 2 John. Ch. 59; *Clark vs. Dutcher*, 9 Cow. 674; *Wintermute's Executors vs. Snyder*, 2 Gr. Ch. 490; *Hunt vs. Rousmanier*, 1 Pet. 15; *Bank of United States vs. Daniel*, 12 Pet. 55.

The maxim *Ignorantia legis neminem excusat*, which, as Judge Story remarks, is so old as to have been long laid up among the settled elements of English jurisprudence, is applicable to the case under consideration. Both parties have acted honestly, and they are left by the law to stand just where they voluntarily placed themselves.

A question quite analogous to the one I am considering was before the Supreme Court of California in *Kenyon vs. Welty*, 20 Cal. 637, and after a careful examination of the authorities, the court held that where a contract was entered into by the parties under a mutual supposition that the law affecting the subject of the contract was in accordance with a previous decision of the Supreme Court upon a similar state of facts, it would not be set aside because of a subsequent decision of the same court overruling the former one and declaring a different rule upon the subject.

The assignees have not exhibited a case where they are entitled to relief, and the rule to show cause must be discharged.

James Buchanan, Esq., for assignee.

Frederick Kingman, Esq., for the respondent.

Circuit Court of United States.

District of New Jersey.

[Leg. Int., Vol. 30, p. 124.]

EASTON & McMAHON vs. THE NEW YORK AND LONG BRANCH
RAILROAD COMPANY.

1. The Federal Court will not enjoin the erection of a bridge over the Raritan river authorized by an act of the New Jersey Legislature, although it may completely intercept navigation, except as accommodated by draws, where Congress has not legislated on the subject.
2. The Federal Courts cannot be called on to prevent a wrong resulting from the exercise of the power of a State to erect bridges over its own navigable streams, until Congress has taken the initiative by enacting a commercial regulation with which the exercise of such a power is inconsistent.

In equity. Motion for preliminary injunction. Opinion delivered April 1, 1873, by

MCKENNAN, C. J.—This motion was heard by me at Pittsburgh, upon the bill and affidavits exhibited by the complainants. Assuming the truth of the facts therein presented, the complainants' case is one of conspicuous merit, loudly calling for relief, by some appropriate and constitutional method of interposition. A bridge is in process of erection by the defendants over the Raritan river, at its mouth, only ten feet in height above the water, which will completely intercept the navigation of the river, except as it may be accommodated by two draws, each one hundred feet in width.

This river is the outlet to the seaboard of the Delaware and Raritan Canal, and is the highway for an immense commerce, exceeding in its tonnage that of the whole foreign trade of New York by Sandy Hook. It is shown that the erection of the bridge will duplicate the expense of conducting this commerce, besides subjecting it to great perils, which might be avoided by elevating the bridge sufficiently to allow most of the vessels engaged in the navigation of the river to pass under it. Important as are both of the great interests involved in controversies like this one—the commerce conducted upon and across navigable streams—either may lawfully be subjected to such reasonable restrictions as may be essential to the maintenance and development of the other. But when restrictions assume the proportions of a destructive or onerous burden, no just principle of public policy will justify their imposition or sanction their continuance. In this latter category the bridge complained of seems to be placed by the evidence before me. Considering the case, therefore, with this impression of it, it is to be regretted that the relief invoked by the complainants must be denied to them.

The Raritan river is wholly within the territory of the State of New Jersey, and in the erection of the proposed bridge the defendants are acting under the authority of a law of that State. It is not alleged in the bill that the plan of the bridge is not in conformity to the law, but its erection is opposed solely upon the ground that it will seriously obstruct the navigation of the river.

It was, however, very earnestly urged by the learned counsel for the complainants, that, assuming the bridge to be such an obstruction, it must necessarily be an unlawful structure, because the State law cannot be construed to authorize the erection of a nuisance. But this conclusion by no means follows. The erection of the bridge is clearly authorized. No condition is imposed as to its height, or as to the length of its spans, but the construction of two draws, each of the width of one hundred feet, is required. In the absence of any express restriction, therefore, the elevation of the bridge, and the distance between the piers, must be taken as intended to be left to the discretion of the defendants, and the implication is clear, that a provision for two draws of prescribed width was deemed by the State the only requisition necessary to accommodate the interests of navigation. The only question then is, Is the law itself valid? because, if it is, the defendants cannot be restrained from doing what it clearly authorizes them to do.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In neither of these modes is what is called the police power of the States taken away from them. By virtue of it the States respectively may pass laws respecting the health of their inhabitants, their internal commerce, the establishment of ferries, the opening of roads, and the erection of bridges. Thus in the great case of *Gibbons vs. Ogden*, 9 Wheat. 1, the court says: "Inspection laws form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass."

And in the case of the *Passaic Bridges*, 3 Wall. 782, Mr. Justice Grier says: "The police power to make bridges over its public rivers is as absolutely and exclusively vested in a State as the commercial power is in Congress." And again: "That the police power of a State includes the regulation of highways and bridges within its boundaries, has never been questioned."

It must, therefore, be regarded as unquestionable, that the law in controversy is within the range of the legislative power of the State.

But it is equally clear that the power to regulate commerce is vested in the general government, and that it is paramount to the authority of the State. The bridge in question obstructs the navigation of a highway of commerce, materially affects its interests, and is, therefore, practically and necessarily a regulation of it. How then can the maintenance of the bridge be reconciled with the paramount control of the general government over the subject?

The police power to erect bridges embraces within its scope the right to prescribe their location, the height of their piers, the width of their spans, the dimensions of their draws, and the manner in which they shall be erected, managed and used. All the consequences which result from such regulations are within the protection of the legitimate exercise of the power to make them. More or less obstructing navigation, and

abridging its freedom, they operate as regulations of commerce. But these effects are incidental only, and do not necessarily imply the assertion or exercise of a power directly to regulate the subject upon which they operate. So long as they do not interfere with the exercise of a power which is superior, they cannot be challenged as encroachments upon it. Actual collision must occur before an occasion can arise for demanding that the subordinate shall yield to the paramount authority. While, therefore, the commercial power of the general government is dormant, it is beyond the province of the courts to enforce an abridgment of the police power of the States. It is with a law of Congress that the legislation of a State must come in conflict before the latter can be adjudged invalid.

This is the principle established by a series of decisions of the Supreme Court, and, as I understand its definition in *Gilman vs. Philadelphia*, 3 Wall. 713, it is applicable alike to navigable streams, which flow through or between several States, and to those which are entirely within one State but are accessible from abroad through the waters into which they empty.

It was declared by Ch. J. Marshall, in *Wilson vs. The Blackbird Creek Marsh Co.*, 2 Pet. 250, where a dam was erected across a navigable inlet from the Delaware river, by authority of a law of the State of Delaware, and it was said: "But the measure authorized by this act, stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it; but this abridgment, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiffs in error insists that it comes in conflict with the power of the United States, to regulate commerce," etc. . . . "But Congress has passed no such act. The repugnancy of the law of Delaware to the constitution, is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several States; a power which has not been so exercised as to affect the question. We do not think that the act empowering Blackbird Creek Marsh Company to place a dam across the creek, can under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

It was reiterated in the *Wheeling Bridge case*, 18 How. 430, where the structure condemned was a bridge over the Ohio river, which obstructed the passage of steamboats during periods of high water, and then only those which carried very high chimneys.

In *Gilman vs. Philadelphia*, 3 Wall. 272, the court says: that in the bridge case, the court placed its judgment on the ground, "that Congress had acted upon the subject, and had regulated the Ohio river," and that the law of Virginia authorizing the erection of the bridge, "was in conflict with the acts of Congress, which were the paramount law."

It must be considered as sanctioned, at least in the case of the Passaic bridges, in which Mr. Justice Grier, in his opinion in the Circuit Court, dismissing the bill, said: "The police power to make bridges over its public rivers is as absolutely and exclusively vested in a State as the commercial power is in Congress; and no question can arise as to which

is bound to give way, when exercised over the same subject-matter, till a case of actual collision occurs ;" and his decree was affirmed, although by a divided court.

And so again in *Silliman vs. Hudson River Bridge Company*, 4 Blatch. 397, S. C. 1 Black, 582, and 2 Wall. 403, where the question was presented, whether the court had power to enjoin the erection of a bridge over the Hudson, at Albany, proposed to be constructed under a law of the State of New York, "in case the plaintiff, being the owner of vessels holding coasting licenses, shows to the satisfaction of the court, that such bridge, if erected, will materially obstruct, delay or hinder such vessels in the navigation of said river, while engaged in commerce between said State of New York and other States," and upon a dismissal of the bill by the Circuit Court, its decree was affirmed by division of the Supreme Court.

Although the two last cases were decided by an equal division of the judges, and according to the usage in such cases, no opinions were delivered, yet the question stated, as primary and jurisdictional, necessarily engaged the consideration of the court. The judgments pronounced must, therefore, be regarded as authorities binding upon subordinate courts, in cases involving the same question.

But in *Gilman vs. Philadelphia*, *supra*, the subject is fully examined, the true import of the judgments in *Wilson vs. The Blackbird Creek, etc.*, and the *Wheeling Bridge case* defined, and the conclusion announced that, in the absence of congressional legislation, the exercise of the power of a State to erect bridges over navigable streams within its limits, is unquestionable in the Federal courts. The controversy related to the Chestnut street bridge over the Schuylkill river, at Philadelphia, the erection of which was authorized by a law of Pennsylvania, and which entirely cut off all navigation above it by vessels with masts. The Circuit Court dismissed the bill of a riparian owner, whose property above the bridge was greatly reduced in value; and the Supreme Court affirmed the decree, saying: "Until the dormant power of the constitution is awakened and made effective, by appropriate legislation, the reserved power of the States is plenary, and its exercise in good faith cannot be made the subject of review by this court."

As long as these decisions stand, the law must be considered as settled, that a Federal court cannot be called upon to prevent a wrong resulting from the exercise of the power of a State to erect bridges over its own navigable streams, until Congress has taken the initiative by enacting a commercial regulation, with which the exercise of such power is inconsistent. No such regulation is shown to exist in reference to the stream over which the bridge complained of is about to be erected, and so the law of the State of New Jersey is a complete justification of the defendants.

The motion for a preliminary injunction is therefore denied.

M. W. Acheson, Beebe, and John F. Stockton, Esqs., for complainants.

George Shiras, Jr., Benjamin Williamson, and Cortlandt Parker, Esqs., for respondents.

Court of Common Pleas, Philadelphia

[Leg. Int., Vol. 30, p. 432.]

COMMONWEALTH vs. ARMSTRONG.

The act of June 2, 1871, takes from Supreme Court the power of appointing guardians of the poor from and including the year 1871.

Quo warranto. Opinion delivered December 20, 1873, by

PAXSON, J.—On the 26th of May, 1871, the Supreme Court appointed the respondent, James Armstrong, a guardian of the poor of this city, for three years, from the first day of July of the same year, when his then present term would have expired.

This appointment was made in pursuance of an act of assembly, approved the seventh day of April, 1859 (P. L. 400), which, by the second section thereof, authorized the Supreme Court to appoint three members of the said board on the first Monday of June, 1859; one for one year, one for two years, and one for three years; and annually thereafter one member; the appointment to take effect on the first Monday of July following the appointment.

On the second day of June, 1871, the following act of assembly was approved by the governor:

Section 1. That the select and common councils of the city of Philadelphia shall meet in joint convention at any stated meeting in every June thereafter, and elect four persons, one of whom shall represent the minority of said councils, to be members of the board of guardians of the poor of said city to serve for three years.

Section 2. That all acts or parts of acts, so far as they provide any other or different mode of appointing the members of the said board of guardians, be and the same are hereby repealed.

Since the first day of July, 1871, the said respondent has exercised, and he still doth exercise, the franchises, rights and privileges, of a member of the board of guardians of the poor for the city and county of Philadelphia.

Whereupon, upon the suggestion of the attorney-general, a writ of *quo warranto* was issued out of this court, commanding the said James Armstrong to show by what authority he claims to have and enjoy the rights and privileges of the said office.

The case comes up now upon a demurrer by the Commonwealth to the answer of the respondent. The facts, as above stated, are admitted by the pleadings.

Under the act of 1859, above referred to, three of the members of the board of guardians were to be appointed by the Supreme Court, three by the District Court, three by this court, and the remaining three members were to be elected by councils. The members of said board held for a term of three years, so that after the first year each of said courts and councils appointed or elected one member annually. The law stood thus until the second of June, 1871, when the act of assembly of that date was passed, which took from the respective courts absolutely all power to appoint members of the said board, and conferred it upon councils.

It has been suggested that the said last act does not in terms, nor did the Legislature intend that it should, apply to the year 1871, but to every year "thereafter." We do not so understand it. The second section, as before observed, is an absolute repeal of the power of the courts to appoint. It was passed on the second day of June. The time had not then arrived when, by the terms of the act of 1859, the Supreme Court could legally exercise its power of appointment. We are not to presume that the Legislature knew or contemplated that the said court had anticipated the time, and sent in the name of the respondent on the 26th of May preceding. The Legislature evidently intended that the courts should not appoint as theretofore on the first Monday of June. If, therefore, they meant that councils should not elect until the next June, or the "June thereafter," they must have intended there should be a vacancy as to three members of the board for the year 1871. We cannot accept a presumption so at variance with all the probabilities of the case.

The appointment of the respondent was made on the 26th of May, probably as a matter of convenience to the court. Under ordinary circumstances it would have become valid on the first Monday of June succeeding, which was the fifth. In the meantime, the act of the 2d of June was passed, sweeping away the power of the courts in this regard, and carrying this premature appointment with it.

The point was made at the argument that inasmuch as councils have not filled the vacancy, and there is no one to claim his seat, the respondent holds over, and is entitled to retain the office for that reason.

A public officer, elected or appointed for a definite term, cannot hold over upon a failure to elect or appoint his successor, unless by virtue of some law or ordinance. We do not know of any such in this case.

The respondent denies the jurisdiction of this court, upon the ground that a guardian of the poor is not a "county or township officer" within the meaning of the act in reference to writs of *quo warranto*. No authority was cited in support of this proposition. It is probable that none exists, as overseers and directors of the poor have been recognized as township or county officers from the foundation of the government. They are so referred to in the acts of assembly. Our guardians of the poor, although designated by a different official title, are substantially the same officers and perform the same functions.

As the respondent was appointed by the Supreme Court, it has occurred to us there would have been a propriety in making this application in that court. As it has been made here, it is our duty to dispose of it in accordance with our views of the law.

The respondent has no title to the office which he now holds, and we direct judgment to be entered for the Commonwealth upon the demurrer.

P. E. Carroll and Pierce Archer, Jr., Esqs., for Commonwealth.

E. Spencer Miller, Esq., contra.

[Leg. Int., Vol. 30, p. 432.]

PAYNTER et al. vs. CLEGG et al.

An injunction will not be continued against a corporation merely because a dispute has arisen as to the election of directors who have not yet even taken their seat.

Opinion delivered December 20, 1873, by

PAXSON, J.—This was a motion to continue a special injunction. The

act of 16th June, 1836, conferring equity powers upon the courts, expressly provides, that they shall have "the supervision and control of all corporations other than those of a municipal character." To what extent and in what manner such jurisdiction shall be exercised must, in many instances, be determined by the sound discretion of this court, under the circumstances of the particular case.

We will not stop to inquire whether, as was suggested by the learned counsel for the plaintiffs, our supervision of private corporations is of a paternal character. A case might perhaps arise of such confusion in the affairs of a corporation as would justify the court in interfering in a paternal spirit for the common good, and staying the hands of a party or division of its members untill order could be restored. We do not see anything in the affairs of this building association to indicate that it has fallen into hopeless confusion. That some feeling exists among a portion of the members, and that there is a pending contest over the election for secretary and two members of the board of directors, is apparent. An injunction is not the remedy for the latter difficulty. It would strike this corporation as with paralysis, suspending the collection of its dues and the transaction of its ordinary business during the tedious progress of a suit in equity. And for what end? merely to settle a dispute as to the election of the secretary and two out of the twelve directors.

The plaintiffs have not only mistaken their remedy, but they have been premature. The evils complained of are only threatened. The directors, as to whose election the dispute has arisen, have not yet been admitted to their seats in the board; we cannot assume in advance that they ever will be admitted in violation of law and the rights of other corporators. If, hereafter, any person shall be found usurping the functions of an officer of this corporation, the writ of *quo warranto* is a convenient and fitting remedy. The Supreme Court decided, in *Updegraff vs. Crans*, 11 Wright, 103, that it was the appropriate statutory remedy, and ousted the equity jurisdiction of the court. It has the advantage of not bringing the entire business of the corporation to a stand still pending an unimportant election contest.

A bill in equity is not a panacea. It is a specific remedy, to be administered only in particular cases.

The motion to continue the special injunction is denied.

C. H. Gross and Thomas J. Barger, Esqs., for plaintiff.

E. Spencer Miller, Esq., for defendant.

[Leg. Int., Vol. 29, p. 156.]

THE COMMONWEALTH *ex relatione* WILLIAM F. GURNSEY *vs.* WILLIAM K. PARK *et al.*, MEMBERS OF THE SELECT AND COMMON COUNCILS OF PHILADELPHIA.

A private citizen asking for a mandamus against councils, must show a right independent of that which he holds in common with the public at large.

Petition for an alternative writ of mandamus. Opinion delivered May 18, 1872, by

PEIRCE, J.—This case furnishes a fit illustration of the special legislation which is visited upon the city of Philadelphia, without the solicitation of her citizens, or the knowledge of her councils, and against the wishes

of the parties most affected by the legislation. By an act of assembly, approved the 19th day of March, 1872, the councils of Philadelphia were authorized and directed to place Occident avenue, sixty feet wide, commencing two hundred and ninety feet north from the north side of Arrott street, between Leiper street and the Asylum road, parallel with Orthodox street, in the city of Philadelphia, upon the public plans of said city, and to have the said avenue, between the points named, opened, graded, curbed and paved, the opening of the said avenue to be completed on or before the first day of May, one thousand eight hundred and seventy-two, and the grading, curbing and paving of the said avenue to be completed on or before the first day of October, one thousand eight hundred and seventy-two, all acts to the contrary notwithstanding.

To open this avenue according to the directions of said act, it has been variously estimated, will cost the city from forty thousand to one hundred thousand dollars. The length of the proposed avenue is from half a mile to three-quarters of a mile, and all the owners of the land through which it will run, except the petitioner, oppose the opening of it. The petitioner owns a lot on Leiper street, where the avenue begins, 120 feet front and 600 feet deep. At the hearing, the petitioner, by his counsel, disavowed all knowledge of this legislation until it had been enacted. The owners of the other land through which the avenue will run were in court by their counsel to oppose its opening, and it was said at the hearing that this legislation, to use the term of one of the counsel, was engineered by a relative or connection of the petitioner, at a cost to the city of Philadelphia of from \$40,000 to \$100,000, for the principal and perhaps sole purpose of giving the petitioner a front of 600 feet on the avenue to a lot 110 feet deep.

If such enactments can be had against the city of Philadelphia, and there is no prevention of it, or redress for it, it would possibly be better that the city should surrender her charter and franchises, and permit her citizens to endeavor to protect themselves individually against such wanton and destructive legislation as best they can.

At least it is worthy the consideration of the councils whether, as a means of self-protection, it is not necessary to have a competent paid agent of the city, resident at Harrisburg, during the session of the Legislature, to protect her, if possible, against such injurious legislation.

This act having been passed, the petitioner applied to councils to proceed under the act to place Occident avenue upon the public plans of the city and to have it opened, graded, curbed and paved. This the councils have refused to do, and he now prays for a writ of alternative mandamus to compel them to do, or to show cause to the contrary thereof. To this petition the defendants have demurred, and for cause of demurrer assign the following reasons:

1st. The relator does not show a specific legal right, as well as the want of a specific legal remedy.

2d. He does not show a right independent of that which he holds in common with the public at large.

3d. He seeks relief against persons who act in a judicial and deliberative capacity, and who, by his own showing, have already acted by considering the matter in question and refusing his application.

4th. The defendants have no legal power to comply with the requirements of the act of assembly recited in this petition.

It may, perhaps, be considered as well settled, that legislation, even of the extraordinary character presented in this case, is obligatory upon the city authorities; but it does not follow that a private individual may enforce obedience to it, unless he has a right to the enforcement of it independent of that which he holds in common with the public at large.

Without considering the other causes of demurrer, we consider the second cause of demurrer as well taken, viz.: That the petitioner does not show a right independent of that which he holds in common with the public at large.

A question of like character came before the Supreme Court in *Heffner vs. The Commonwealth*, 4 Casey, 108. In that case the relator filed a petition setting forth that he was a citizen and owner of real estate in the borough of Pottsville; that the defendants were members of the town council, and that an act of assembly had been passed on the 8th day of April, 1850, enacting "that the town council of the borough of Pottsville shall have the power and authority, and it is hereby enjoined and required" to open a certain alley in the borough of Pottsville; that he had notified the defendants of the passage of this law, and had requested them to open the alley, and that they had refused to do so, and prayed that a writ of mandamus might be issued. He also set forth that he was the owner of a lot of ground with two dwelling houses erected thereon, through which the alley would pass, and that the opening of said alley would greatly appreciate the value of his said lot of ground.

Woodward, J., who delivered the opinion of the court, said: "Now granting that the relator has an interest in the proposed alley, and that owing to the accident of his position, it will make him two town lots out of what was one before, and thus benefit him more than his neighbors; yet it is manifest that his interest, in kind, if not in degree, is common to all of the inhabitants of Pottsville. The act of assembly was a public statute; the alley was to be a public highway, and every citizen of the Commonwealth will have an equal right to the free use and enjoyment of it. Some property owners may be injured by opening it, but this is no reason why the public authorities should be restrained by the courts from exercising their powers; and yet it would be as good ground for an injunction at the suit of a private complainant, as the incidental advantages anticipated by the relator are for the mandamus he wants. Be it that he has no other remedy, he has no right to the one he seeks, because he has no interest that is specific—that is definite and peculiar to himself, and which is at the same time a legal cause of action. He has no more right to call on the municipal authorities to open an alley to put money in his pocket than he would have to require them to build him a house. The ground on which his action rests is his right of passage; his right to enjoy the alley as an alley. Now, under such circumstances, this right is not peculiar to him, but common to the whole town, and therefore a subject of public concernment. It will be soon enough for the courts to interfere to open that alley when those public officers whose duty is to see that the laws are executed move the courts to action. The law was enacted for the public, and if the public acquiesce in its non-execution the courts, who are only other agents of the public, have no duty or power in the premises. The law was not made for the relator and confers on him no such rights as the courts can be called on to guard,

and, therefore, his complaint ought to have been dismissed at his costs." This reasoning of Judge Woodward is too clear to need further amplification; and the decision governs the case now under consideration. The city of Philadelphia has paid for damages for the opening of streets since the first day of January last the sum of \$196,707.34. A large portion of it has been caused by special legislation of the character complained of, and it is the duty of the municipal authorities to resist this injurious legislation when, and in the best way, they can.

This petition is dismissed with costs.

E. R. Worrell, Esq., for relator.

William J. McElroy, Esq., for city councils.

J. Cooke Longstreth and Joseph B. Townsend, Esqs., for Large's estate.

John Shallecross and Charles S. Pancoast, Esqs., for estate of Overington and Horroch.

[Leg. Int., Vol. 29, p. 300.]

McINTYRE *et al.*, TAX-PAYERS, ETC., vs. PERKINS *et al.*, BUILDING COMMISSIONERS *et al.*

1. The public building commission under act of August 5, 1870, enjoined from entering into a contract, differing in terms from the advertisement inviting proposals.
2. Tax-payers have a standing in court, in all cases in which public servants are expending moneys or imposing liabilities upon them.

Opinion delivered *September 14, 1872*, by

FINLETTER, J.—The plaintiffs are tax-payers of the city of Philadelphia. The act of assembly, approved August 5, 1870, constituted a number of the defendants "commissioners for the erection of public buildings." It is therein provided that "they shall advertise for proposals and make all needful contracts for the construction of said buildings; which contracts shall be valid and binding in law upon the city and upon the contractors, when approved by a majority of the said board of commissioners."

In pursuance of this act the commissioners advertised for proposals for granite. Two of the conditions to which each proposal was required to conform by the advertisement were as follows: "*Third.* All the labor of dressing the stone must be performed in Philadelphia, and the cost must be stated in gross for the rough material and also for it dressed and set in the basement and area walls complete, and dividing the same from the superstructure. And *Sixth.* It must be accompanied by a certificate that a bond in the amount of \$20,000 has been filed with the solicitor of the commission, at his office, No. 208 West Washington Square, to the effect that if the lowest bidder shall not execute a contract with satisfactory security to the amount of one-fourth of the whole contract within five days after the work is awarded, he will be deemed as declining, and will be held liable on his bond, for the difference between his bid and that of the next lowest bidder."

The defendants, Comber, Sergeant & Co., were the lowest bidders. Their bid was \$515,500, if the stone was dressed at the quarry, but if dressed in Philadelphia, whatever the extra cost of having it cut there in addition, which was subsequently stated to be \$77,325.

On the sixth day of August, 1872, the commissioners directed their president to enter into a contract with Comber, Sergeant & Co., for setting

the stone for the sum of \$515,500, security to be given in ten per cent. of the amount of their bill, with no restriction as to the place of dressing the stone.

It is obvious, that before the commissioners can legally enter into any contract for the erection of the public buildings, they must first "advertise for proposals." If it be conceded that they may stipulate that the work must be done at a particular place, still it is manifest that the advertisement and the contract must conform in their material and essential particulars. An advertisement for granite would not justify a contract for marble. A contract which does not so conform, is not based upon the advertisement. It is without advertisement, and being so is not authorized by the act. It is, therefore, void. The commissioners have no power to do anything except under and by virtue of the act of assembly.

I have no hesitation in saying that the reduction of the security from \$128,775 to \$51,550, and the permission to dress the stone at the quarries, are material and essential matters. If the reasoning be correct, it follows that the proposed contract with Comber, Sergeant & Co., is one which the commissioners have no authority to make. We will, therefore, restrain them from making it if we have jurisdiction and the plaintiffs are *recti in curia*.

It was contended by the defendants that the complainants have no standing in court because they have not averred special injury. In this respect, perhaps, the bill is faulty. It may, however, be amended.

Whilst it is necessary to show in what manner the injury arises it is not practicable always to show the extent of the injury. How can a tax-payer show in figures his injury? It is enough for him to present such a statement of facts as necessarily leads to the conclusion that the taxation to which he is subjected is or may be injuriously affected. It is safe to hold, in all cases where our public servants act in violation of law in expending public moneys or in imposing liabilities upon the taxpayer, that such an injury necessarily arises as will give him a standing in court to invoke successfully its restraining power. This is the doctrine of all the cases in which tax-payers have been complainants. They are too numerous and too well known to require citation in detail.

It was also contended, that even if it be conceded that the commissioners are acting in violation of law, or without authority, and that the plaintiffs are properly in court, the act of April 8, 1846, interposes an insuperable bar to the relief prayed for.

It cannot be that our public servants are above all law simply because they are engaged in the erection of a public building. Such is not the spirit and meaning of the act. Even if this were an application to restrain the further erection of the public buildings, the defendants could not invoke the benefit of this act if it appeared that they were erecting them in violation of the act of assembly empowering them to act. It must be a "public work erected or in progress under the authority of an act of the Legislature." How can that be said to be done "under the authority of an act of the Legislature," which is done in violation of and contrary thereto?

The plaintiffs, however, do not ask us, directly or indirectly, to restrain the further erection of the public buildings. We are asked merely to restrain the defendants from entering into an illegal contract

injurious to the rights and interests of the plaintiffs. If the effect of this be to retard the erection of a public work the cause is not our restraining hand, but the illegal act of the defendants.

It was suggested in argument that the commissioners had already verbally entered into the contract with Comber, Sergeant & Co., and that an action for damages would result if they were not allowed to furnish the granite in pursuance of the contract. If the commissioners had no authority to enter into the contract, no action can arise for a breach thereof against the city. If they had authority, the measure of damages would be the expenses arising from the contract having been entered into. It is not likely they would be of much importance; certainly not sufficient to make us pause in restraining the defendants if we believed it to be otherwise our duty to do so.

I am not disposed to doubt that the contract is founded in the strictest integrity, and might be most beneficial to the interests of the city. I am, however, constrained to believe that it is better to suffer a present loss than to open a door through which a deluge of iniquity might overwhelm us. If for a seeming gain we sow in wrong, the harvest to us, or to our children, will be disappointment, extravagance and corruption. I would not question the wisdom and integrity of the commissioners. Nor have I any reason to suppose that they might not be trusted without limit in the discharge of their duties. Still the wisest discretion of the best and purest men will always find ample scope and verge enough within the line of duty marked out by the law. Discretion which overleaps that, is not wise, and cannot result in good. It is without compass or rudder, and when temptations beset it, it has no safe anchorage.

There is but one course for the court to pursue, and that is to hold unflinchingly all who have public trusts to perform to the most rigid accountability under the law. More than this we have no desire to do, less we may not do.

This case has been fully considered by the whole court, and the judgment of the whole court is that the special injunction heretofore granted shall continue until further order.

John P. O'Neil and W. J. Budd, Esqs., for plaintiffs.

Robert N. Willson and H. M. Dechert, Esqs., for defendants.

[Leg. Int., Vol. 29, p. 300.]

HEMPHILL'S ESTATE.

Commission on corpus of trust fund (\$46,500) reduced to one and a-quarter per cent.

Opinion delivered July 6, 1872, by

ALLISON, P. J.—In the matter of the trust estate of Maria A. V. Hemphill, under the will of Stephen Girard.

We gather from the paper-book (not having before us the report of the auditor) that the following are substantially the facts upon which the auditor adjudicated, in passing upon the question of the commissions which he awarded to the accountant.

The principal or corpus of the estate amounted to about \$46,500.

The portion of the estate which was invested or reinvested by the trustee did not exceed \$13,000.

There was claimed and allowed to the accountant, under contract with the *cestui que trust*, seven per cent. upon income, which amounted to over \$200 per year, for six years, say \$1250.

The auditor awards the accountant in addition to the seven per cent. on income, two and a half per cent. on the corpus of the estate, to which award exceptions are filed.

Is the allowance of the auditor a just and proper compensation, for the performance of services to this estate by the trustee, or are they excessive, as exceptants claim, in view of the fact that he has already received upon income \$350 more than would be awarded to him but for his special agreement with Mrs. Hemphill?

In *Barton's Estate*, 1 Parsons, 29, decided in 1842, the court, King, President, condemns the allowance of two and a half per cent. commissions on reinvestment. Alluding to the fact that purchases of stocks are usually made through brokers for one quarter of one per cent., with but little trouble to the purchasers, he says one per cent. commissions to trustees in such cases, comes much nearer to accuracy than two and a half per cent.

In this very trust, in the case of *Maria Hemphill's Trustees*, 1 Parsons, 30, the same judge remarks: As a general rule, commissions on the principal sum coming into the hands of a trustee, and on reinvestment of the same, will not be allowed where the usual commission of five per cent. has been charged on the interest and profits derived from such investments. This decision is affirmed in 6 Harris, 303.

M' Causland's Appeal, 2 Wright, 466, went up on an appeal from this court. Commissions on the corpus of the estate, which consists of a corporation bond for \$4000, which the accountant received as an investment made by the testator in his lifetime, were refused. The bequest was a specific one, and commissions on the principal of the estate was for this reason denied to the trustee. This was affirmed with the remark, that by no recognized principle can commissions on the trust fund itself be allowed.

Thus stood the law in Pennsylvania in 1861, but in 1864, in *Lukens' Appeal*, 11 Wright, 356, one and one-half per cent. commissions were allowed on the principal of the trust fund. The case was distinguished from *M' Causland's Appeal*, on the ground that the bequest was not a specific gift. The distinction is, however, more one of shadow than of substance, grounded as it is, on the liability of a guardian to collect one-half of a mortgage bequeathed to his ward. It does not appear that he was compelled to make the collection, but the court held, that as his trust was coupled with such liability he was entitled to commissions out of the body of the fund. This case may be regarded as recognizing the rule, that where such liability exists, especially if labor is performed, or responsibility is incurred, in connection with the proper care and management of the principal of the trust estate, a reasonable commission will be allowed over and above the percentage on profit derived from the investments. It has always seemed to me to be but just, that when a trustee is held to the exercise of prudence, diligence and good faith, as caretaker of an estate, he ought to be compensated for his responsibility and watchfulness, in addition to his pay for collection of income. Sometimes this compensation takes the form of an allowance of a gross

sum, as in *Pedrick's Estate*, 5 Phila. Reps. 478; and in *Spangler's Estate*, 9 Harris, 337; and *Lowries' Appeal*, 1 Grant, 373, this principle, often acted on in this court, is recognized.

Each case as it arises must be determined on its specialties; applying to it such principles as are recognized by the Supreme Court to be the law in this State upon the subject of fiduciary compensation. What then are the peculiarities of the case before us? First, this trust in the hands of the present trustee, was not cast upon him by the will of the testator; he assumed it at the request of the *cestui que trust*, and this imposed upon him the necessity of entering security, which was given in the sum of \$75,000; for this alone, if purchased from one of the trust companies of this city, he would have had to pay one per cent.; that has become an established rate of compensation for the risk incurred upon a suretyship of this nature.

The second feature of the case which makes it stand by itself, is the fact, that trustees have received two per cent. more than the usual rate on income, which as already stated, amounts to about \$350, and this we think ought to be taken into account in determining his rate of compensation. We do not agree with the suggestion, that we are not to consider the sum paid or allowed by Mrs. Hemphill on income, and that this allowance should have no effect upon the present claim. On the contrary, we hold that this is an important and material part of the whole case, and as Judge King remarked, in this very estate, in 1 Parsons, that it was a sufficient reason for rejecting a claim for commissions on the body of the estate, that the usual commission of five per cent. had been allowed on income. Considering the law as to some extent modified by *Lukens' Appeal*, so far as it affects the principal of an estate, yet we are not to close our eyes to the fact of compensation given and received on yearly interest or profit; to do this would be to reject the equitable consideration, which lead the court in some cases to look away from percentage and award a sum in gross.

The securities in the hands of the trustee, like the mortgage in the possession of the guardian in *Lukens' Appeal*, were probably all liable to be converted or changed by the trustee, and if so, they are, under the authority of that case, subject to a charge for commissions, but this case differs from *Lukens' Appeal* very materially in the amount of the trust fund, and demands a lower rate of commission upon the body of the estate, say one and one-quarter per cent., which on the proximate sum of the corpus of the estate, say \$46,500, would be equal to the sum, \$581.25. This allows the contract as to percentage on income to stand, though it gives to the trustee at least \$350 above what he would have been entitled to, under this head of his claim, if no contract had been made with Mrs. Hemphill. The reduction from the award of the auditor, to be entirely accurate, taking his figures to be correct, would amount to the exact sum of \$584.05. We direct the award to the trustee to be reduced to this extent. With this modification, the report is confirmed.

[Leg. Int., Vol. 29, p. 317.]

COMMONWEALTH OF PENNSYLVANIA *ex rel.* CALEB H. NEEDLES AND JOHN KAMES *vs.* ALEXANDER OMENSETTER AND A. WILSON HENSZEY.

1. That the number of members of common council of the city of Philadelphia, to which each ward is entitled, shall be determined by the number of taxable inhabitants of the ward, according to the list of taxables for the year preceding the organization.
2. That since the registry act of 1869, and its supplements, no list of "taxable inhabitants" having been made for the year 1871, the number of members of common council, that each ward was entitled to elect in October, 1871, is to be determined by the State census of 1870; that being the latest list of taxable inhabitants made preceding the organization in 1872.

Quo warranto to test the right of Alexander Omensetter and A. Wilson Henszey, to hold their seats as members of common council from the Tenth ward, in the city of Philadelphia.

By the act of March 21, 1861, it is provided: "That each ward of the city of Philadelphia shall have a member of common council for each two thousand of taxable inhabitants that it shall contain according to the list of taxables for the preceding year, who shall serve for two years from the first day of January succeeding their election." And by the act of April 16, 1866, it is provided: "That the true intent and meaning of the act of March 21, 1861, shall be, that the preceding year mentioned in the said act shall be held and taken to be the year preceding the organization, and not the election."

During the year 1871, the Tenth ward was represented in common council by two members, George W. Hall and Alexander Omensetter. The term for which the latter had been elected would expire on January 1, 1872. At the election in October, 1871, said Alexander Omensetter was re-elected for two years, together with A. Wilson Henszey, as an additional member, thus giving the ward three members in common council.

The petitioners alleged that the ward at the time of the election of said two members, contained but 5556 taxable inhabitants, which required the election of only one member, and therefore the election of the defendants was illegal.

The defendants alleged, that since the passage of the registry act of 1869, and its supplements, no list of taxable inhabitants of the different wards of the city had been made for the year 1871. That the only enumeration existing was the State census of 1870 by the assessors, under the act of January 6, 1821; this gave the Tenth ward in 1870, 5800 taxable inhabitants, which, with the increase of population during the succeeding year, would show at least 6000 taxable inhabitants, and authorize the election of defendants.

Opinion delivered *September 28, 1872*, by

PERCE, J.—This is a proceeding by *quo warranto*, the petitioners alleging that the defendants were illegally elected members of the common council from the Tenth ward of this city. The act of March 21, 1861, and the act of April 16, 1866, regulating the basis of representation in councils, require, that there shall be two thousand taxable inhabitants for every member of common council; and this was to be determined by

the list of taxables made in the year preceding the organization of councils.

Under the very words of the act, this was the only rule for the guidance of the court in such a question as this, and the Supreme Court have so decided in *Commonwealth vs. Meeser*, 8 Wright, 341. It seems there was no list of taxable inhabitants of the Tenth ward made in the year 1871, the year preceding the organization of the common council for 1872, to which these gentlemen were elected, a list of qualified voters having been substituted by the registry acts. But there was a "list of taxable inhabitants" for the year 1870, that being the septennial census by the assessors under the act of 1821. This showed the ward to contain 5800 taxable inhabitants. I have consulted with my brethren, and they are all of the opinion, that we can only be guided by the last list of taxables that was made, to wit, the census of 1870.

This does not show enough taxable inhabitants to entitle the Tenth ward to three representatives in common council, and did not warrant the election of the defendants at the general election in October, 1871, therefore their election was undue, and not according to law.

Judgment of ouster.

Thomas H. Speakman and *William Henry Rawle*, Esqs., for petitioners.
William B. Hanna and *William B. Mann*, Esqs., for defendants

[Leg. Int., Vol. 29, p. 396.]

COMMONWEALTH *ex rel.* CALEB H. NEEDLES AND JOHN KAMES *vs.*
A. WILSON HENSZEY.

By the act of May 20, 1864, a vacancy in councils may be filled by election, although occurring within twenty days of the election.

Quo warranto. Demurrer. Opinion delivered December 7, 1872, by LUDLOW, J.—This case comes before the court upon demurrer to the plea filed by the defendant, and is intended to test the right of Mr. Henszey to his seat as a member of the common councils of the city, for the Tenth ward.

It is admitted that on the 28th day of September last, this court ousted the defendant and one Alexander Omensetter, from their offices as members of the common councils of the city, for a cause which it is unnecessary now to state, and as the judgment in that case was not entered of record or pronounced until the 28th of September, 1872, and within twenty days of the next general election, it is contended that no vacancy occurred which could legally be filled at the general election of October, 1872.

If this proposition can be sustained, then the formal election, under which the defendant now claims to hold his seat for an unexpired term, was of no effect, and any title based upon it must be null and void.

In the view we take of the case, it is unnecessary to decide when the vacancy occurred, because (and we incline to this view), supposing that the seat became vacant only upon the 28th day of September, 1872, and within twenty days of the then next general election, we are of the opinion that the Legislature of the State has settled the question in favor of the defendant.

Without going out of our State to obtain judicial expressions of opinion upon the subject, it is enough to know that here it has been decided that

the Legislature may constitutionally declare when and how a vacancy shall be filled. In the *Commonwealth vs. Maxwell*, 3 C. 444, it was declared that even in a case where a constitutional provision existed, the Legislature may, nevertheless, by an act of assembly, establish auxiliary rules to give effect to general principles, and of course this doctrine must apply with great force where the Legislature has by acts of assembly, regulated a subject over which it has complete control.

The only point which seems now to present itself is this: Was this election held according to the terms of any act of assembly? If so the election was legal, and the certificate based upon it was valid.

There are two laws relating to the subject. The first, approved April 27, 1864, is as follows:

"A further supplement to the act to incorporate the city of Philadelphia, relative to filling vacancies in councils.

"Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, that in case of a vacancy occurring hereafter, in either branch of the councils of Philadelphia, the qualified voters of the ward, at the next election, shall elect a person for the unexpired term."

The second will be found in the third section of the act of March 20, 1864. This section reads thus: "In case of a vacancy occurring in either branch of the councils of Philadelphia, the same shall be filled at the next general election, for the unexpired term." It will be observed that both of these laws were passed in the same year. The third section of the first law provides for a notice of twenty days, while the second law is in substance but a repetition of the first section of the act of April 27, and is silent as to any further provisions relating to the subject.

We are in duty bound to give a legal effect to every law of the Commonwealth, and if we do not declare that the third section of the act of May 20 has a meaning beyond the reach of any interpretation which may be put upon the language of the act of April 27, of the same year, we undoubtedly say that the third section of the act of May 20 is not only a nullity, but that its language is but useless jargon.

Believing that the Legislature intended to do something, we discover, we think, what that intention was, when we find that a case might arise *within* twenty days of the then next general election not provided for in the act of April 27; to meet such a case as that the third section of the act of May 20 was passed. The able counsel for the relators doubtless saw the force of the view now taken when they argued that these laws are in *pari materia*, and the answer to that argument, we think, is well stated in Dwarries on Statutes, 705, where Ashhurst, J., said "that all the general powers and provisions given and made in acts *in pari materia*, shall be virtually incorporated in this, but that such provisions as are always considered special provisions shall not." We find a special provision in the act of April 27; we cannot see how we are to incorporate it in the subsequent act of May 20, when we can well understand how a case may arise beyond the scope of the act of April 27.

We were impressed strongly with that argument, in which was depicted the evils which might arise to the public should an election be held, really without notice, for as important an office as this is. When the

case arises we will dispose of it ; it is enough now to say, that in this instance, no trick was played, or fraud, either in law or in fact, perpetrated. The sheriff gave to the voters of the Tenth ward public notice of this election on the 1st of October ; every elector knew perfectly well that two members of councils were to be elected, and the best proof of the fact is that at the election the full vote of the ward was cast for the offices. In the face of these facts we are not disposed to destroy an act of assembly, and that, too, when confessedly it has worked injury to no one. Demurrer overruled.

This matter was laid before all the judges of the court except Judge Peirce, who was confined to his house by indisposition ; and the entire court was unanimous in the foregoing opinion and judgment.

*City Solicitor Collis and District Attorney Mann, for Henszey.
Messrs. Rawle and Meredith for the Commonwealth.*

[Leg. Int., Vol. 29, p. 397.]

IN THE MATTER OF THE PROTHONOTARY.

The court will not hold the prothonotary to bail for misfeasance in respect to the election returns, except upon complaint made in the usual manner.

Sur order to produce election papers. Opinion delivered *December 7, 1872*, by

FINLETTER, J.—The laws regulating elections are as perfect, perhaps, as human skill can make them. They secure to every man who has the right to vote its freest exercise. They make his vote effective by rendering it almost impossible to poll a fraudulent one. They furnish the means by which the detection of frauds upon the elective franchise may be swift and sure. For these purposes, however, they require simply that those who administer them shall perform their duties faithfully. Unless this be done, the very machinery which was designed to produce these ends become the most efficient for the successful perpetration of frauds, which practically disfranchise the honest voters. Based upon law, environed by forms of law, clothed with the habiliments of law, their detection becomes impossible.

The election laws have a threefold relation : First. Preparing for the election. Second. The conducting of the election. Third. Securing the evidence of the election.

The checks for the prevention of frauds are : First. The canvassers. Second. The officers who conduct the election. Third. The custodians of the ballots and other evidences of the legality of the election. It would be difficult to say which class of officers are most important in securing an honest expression of the popular will.

However this may be they are each and all officers of the law. From each and all fidelity in the performance of their several duties must be exacted with the sternest strictness, or else an election becomes an expensive farce.

If the canvassers be derelict, the stream is corrupted at the fountain. If the officers who conduct the election are faithless, they can manipulate the tickets and other evidences of the election beyond the hope of detection. If the custodians of the evidences be regardless of their sworn duty, it is in vain that canvassers and officers faithfully perform their

duties, because the evidences of the election may be tampered with and corrupted, and when frauds have been perpetrated the means of detection may be destroyed.

The thirty-second section of the act of February 2, 1854, is as follows: It shall be the duty of the judge of election in every election division of said city, at every general municipal and special election, to make out and subscribe, on the night of such election, a certificate of all the votes given at such election division for every office voted thereat; and it shall be the duty of the judge to deliver the same to the prothonotary of the Court of Common Pleas, on the day succeeding such election before noon of that day, which certificates shall be open to the inspection of any citizen. And any judge who shall fail to deliver such certificate as aforesaid to the said prothonotary shall forfeit fifty dollars; and the said prothonotary shall, on the second day after such election, make out and deliver to the sheriff of the said county a certified list of the judges of each and every division from which such certificates shall not have been received as aforesaid, with a precept to the said sheriff to levy and collect the said penalty from the said judges.

From this it will be seen that the prothonotary is an officer to assist in carrying into effect the laws relating to elections. He is made the custodian of the evidences of the election, and is armed with power to enforce obedience to his authority in the performance of his duty.

It is incumbent upon him:

1st. To enforce compliance with the law which requires these evidences of the election to be filed in his office.

2d. To keep them safely when they are filed.

The evidence before me upon the hearing disclosed these prominent facts:

1st. The election papers were kept for nearly a month in a place accessible to any one.

2d. Forgeries in the papers by alterations.

3d. Some of the division judges have made no returns.

4th. The prothonotary has made no effort to make these officers comply with the law, by filing the returns, or to proceed against them for non-compliance.

5th. The prothonotary refused to make any effort to secure the return from the First division of the Seventeenth ward, or take any action therein when requested by a candidate who had been voted for in that division.

6th. Certain election returns have disappeared very soon after they were seen in the custody of the prothonotary.

These facts seem to establish the grossest carelessness in the performance of his duty by the prothonotary, and also a wilful disregard of the requirements of the law.

If a public officer intrusted with definite powers to be exercised for the benefit of the community wickedly abuses or fraudulently exceeds them, he is punishable by indictment, though no injurious effects result to any individual from his misconduct.

The crime consists in the public example in perverting these powers to the purposes of fraud and wrong which were committed to him as instruments of benefit to the citizen and of safety to public rights. *State vs. Glasgow*, Conf. R. 38.

Wherever, on a justice, or elsewhere, a public duty is imposed, a failure to perform it is indictable. *Wilson vs. Commonwealth*, 10 Serg. & R. 375.

The prothonotary appeared before us in obedience to an order to produce certain papers, of which he was the legal custodian as an officer of this court, and was examined under oath. With the manner of his submission to that order no exception has been taken. It has expended its force, and there is nothing upon which any further action can be based. If, as an incident of this inquiry, it appeared that he had violated the law in any particular; and if we have the right in any instance to hold to answer for a misdemeanor without complaint having been first made, it is a power to be sparingly exercised, and only when imperatively demanded by the ends of public justice. To know by whom and for what he is called upon to answer in a criminal court is the right of every citizen, and one which we have no desire to abridge.

We refuse, therefore, the motion to hold the prothonotary to answer as for a misdemeanor in office. Upon presentation of a proper complaint we would have no hesitation in issuing a warrant.

[Leg. Int., Vol. 29, p. 364.]

WESTERN UNION TELEGRAPH COMPANY vs. THE PHILADELPHIA AND READING RAILROAD COMPANY *et al.*

Where there is no irreparable injury alleged beyond a general averment of a breach of contract, a court of equity will not interfere.

Sur motion to continue special injunction. Opinion delivered November 9, 1872, by

PAXSON, J.—The plaintiffs ask that pending this bill the defendants may be enjoined against using and operating a certain line of telegraph, including the polls, arms, wires, stretchers and appurtenances thereof, between Mahoney Junction and Milton, and extending along the line of the Catawissa, Williamsport and Erie Railroad.

It is claimed by plaintiffs that under a certain contract between the original proprietor and builder of this line of telegraph and the said Catawissa, Williamsport and Erie Railroad Company, the latter had no right to use said line for general or public purposes; the said contract limiting them in the use thereof to strictly railroad matters; and that the defendant corporations, one of which is the lessee of the Catawissa, Williamsport and Erie Railroad, have no higher or greater right.

The plaintiffs claim that as assignee of the original builder of said telegraph line, they are entitled to the benefit of said contract, and to enforce it in equity against the defendants.

Affidavits were submitted on behalf of the said defendants establishing the fact, which is not denied, that from November 1, 1867, to November 1, 1872, at which latter date the lease from the Catawissa, Williamsport and Erie Railroad Company to the Philadelphia and Reading Railroad Company took effect, the said telegraph line had been in the absolute and exclusive possession of the former company, and during that time has been used for general or public purposes without objection on the part of plaintiffs or any one else.

The plaintiffs contend, however, that this was by sufferance, or by

virtue of a mere license, revokable at pleasure, and that said license has been revoked.

Keeping in view the fact that the question now to be decided is, whether pending these proceedings, and the adjustment of the legal rights of the parties, the defendants shall be specially enjoined, I look in vain through this bill for anything to justify such interlocutory order. There is no averment of any such irreparable injury as would make it the duty of a court of equity to interfere by special injunction. There is no injury whatever alleged beyond a general averment of a breach of contract. For such grievances the law has its appropriate remedy.

In addition to this, the plaintiffs, or those under whom they claim, have permitted the lessors of defendants to use this line of telegraph for several years without question. They have slept upon their rights; and it is no answer to this to say, that the status of things has been changed by the lease of the Catawissa road to the Reading road. Whatever rights or privileges the former possessed, incident to the road, pass to their lessees.

I do not think the plaintiffs have made out a case entitling them to the special relief prayed for; and the motion to continue the special injunction heretofore granted is denied.

George L. Crawford, Esq., and Hon. Benjamin Harris Brewster, for plaintiffs.

James E. Gowen, Esq., for defendants.

[Leg. Int., Vol. 29, p. 196.]

WEST PHILADELPHIA PASSENGER RAILROAD COMPANY vs. THE UNION PASSENGER RAILWAY COMPANY.

BARCROFT vs. THE SAME.

1. An adjournment of the House, for more than three days, without the concurrence of the Senate, does not *ipso facto* work a dissolution of the General Assembly.
2. The act of assembly of March 13, 1872, held not to give defendants the right to run their track along Front street, or to make the intended connection at that point. ALLISON, P. J., LUDLOW and FINLETTER, J. J.
3. This act of assembly sins against the constitutional requirement that no act shall contain more than one subject, and that its title does not clearly express the subject contained in the act. ALLISON, P. J., and FINLETTER, J.

The following is the act of assembly under which the defendants claimed the right to lay their track on Market street.

A FURTHER SUPPLEMENT

To an act, entitled "An act to incorporate the Union Passenger Railway Company of Philadelphia, approved April 8, A. D. 1864," authorizing the said company to declare dividends quarterly and to lay additional tracks of railway.

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same, that dividends of so much of the profits of the said railway company as shall appear to be advisable to the directors shall be declared semi-annually, or quarterly, in each and every year, as the said directors shall see fit.

Sec. 2. That the said company are hereby authorized to extend their track along Jefferson street from Seventh street to Thirty-third street,

and along Seventh street from Oxford street to Columbia avenue, and also to lay a double track on Market street from Ninth street to Front street, under and subject to all the restrictions, and with all the privileges and immunities, mentioned and contained in the act incorporating the said Union Passenger Railway Company, and the several supplements thereto.

Approved March 13, 1872.

Opinion delivered June 15, 1872, by

ALLISON, P. J.—In the matter of the bills filed by *The West Philadelphia Passenger Railway Company*, and by *Barcroft et al. vs. The Union Passenger Railway Company*, the court are unanimous in their opinion that an adjournment of the House of Representatives for more than three days without the concurrence of the Senate, contrary to the direction of the 17th section of article 1st of the Constitution, did not *ipso facto* work a dissolution of the general assembly. That this section is to be considered in connection with the latter clause of the 12th section of the same article, which gives to a minority of either House the power to meet from day to day and enforce the attendance of absent members in the manner and under such penalties as may by law be provided. This, in our judgment, contemplates not a dissolution of the Legislature by reason of a majority of the members absenting themselves without right from the legal place of meeting, but on the contrary, means that such an irregularity shall be corrected by investing a minority of the House with power to compel attendance and a resumption of legislative duty. The wrongful act of a majority illegally absenting themselves from the place of meeting for any reason can be corrected in the manner provided in the 12th section of article 1.

Upon the remaining questions presented by the whole case as it now stands before us the court are divided in opinion.

Judges Peirce and Paxson are in favor of dissolving the injunction upon all the points upon which the plaintiffs rest their case. Judge Peirce, however, doubts the right of the defendants to make the connecting loop at Front street. And Judge Paxson requests me to say for him that he entertains a very strong doubt upon the point as to whether the title of the act does not conflict with the requirement of the Constitution, which holds that the subject of an act of assembly shall be clearly expressed in the title of the act. The benefit of the doubt upon both these points is given to the statute.

Judge Ludlow is in favor of continuing the injunction because he does not find in the act of March 13, 1872, an authority to connect the road of the defendants at Seventh and Ninth streets with the new track upon Market street, and is also of the opinion that there is no right given to make the proposed connection at Front street. Entertaining serious doubt upon the question of the title of the act he reserves his judgment upon this point.

Judge Finletter agrees in opinion with Judge Ludlow that there is no right given by the act to make the contemplated connection at the several points mentioned. He also holds that the act of 1872 sins against the constitutional requirement that an act of assembly shall contain no more than one subject, and that the title of this act does not clearly express the subject contained in the act.

I am with the plaintiffs because I do not find in the act of March 13, 1872, any express or implied power to run the track of the new road along Front street, or to make the intended connection at this point; and for the further reason that the title of the act not only avoids a clear expression of the subject contained in the body of the bill, but that it disguises and conceals it. The phrase "to lay additional tracks of railway," does not clearly express the subject of establishing a new route of railway, which is given by the act of 1872.

Three of the judges, therefore, are in favor of continuing the preliminary injunction, though, as will be seen, for reasons which are not in entire accord.

Injunction continued.

Theodore Cuyler and George W. Biddle, Esqs., for plaintiffs.

Henry M. Phillips, Edward Olmstead, Esqs., and Hon. F. Carroll Brewster, for defendants.

[Leg. Int., Vol. 29, p. 196.]

ELECTION LAW.

1. Persons under treatment at a hospital, are not entitled to vote as residents.
2. Soldiers of the United States must prove residence when required by the canvassers.
3. The names of soldiers temporarily located in an election division need not be registered therein.
4. Residence is accurately defined in the Constitution.
5. An hotel-keeper residing in another place should be registered at his private residence.

September 23, 1872.—In the matter of the canvassers of the Second division of the Eighth ward.

The house, No. 911 Locust street, is an asylum for inebriates.

At the meeting of the canvassers for extra assessment appeared five men who all proved their residence by two householders, made the affidavit required by the act, and claimed to be put upon the list.

They are all patients under treatment at the asylum, and have been there respectively from two weeks to two months.

They have all been residents of other parts of the city until their removal to the asylum for treatment, and most of them are men of family.

The question presented is as to the right of these men to be assessed from this house.

G. MORGAN ELDRIDGE,

Canvasser, Second division, Eighth ward.

Persons who are in the hospital for the purpose of obtaining medical treatment do not obtain thereby a residence in such hospital, so as to entitle them to be registered as living or residing therein. The purpose is a temporary one, and from the nature of the purpose to be obtained no residence can thereby be acquired.

JOSEPH ALLISON.

JAMES R. LUDLOW.

I concur in the above.

The following questions were submitted to the court and answered on September 19, 1872, as follows:

I. The 34th section of the registry act provides, that every person who shall be required by either of the division canvassers to prove his

residence in the division in which he applies to be registered, shall by his own oath and the affidavit of two qualified electors, who are private householders, prove that he is a *bona fide* resident of the division, and that he will be a qualified voter. Does not this apply to soldiers in the army of the United States as well as to any other person?

I answer this in the affirmative.

II. Must not a soldier of the United States, like all other persons, if required, establish, as provided by section thirty-four of the registry act, that he is a *bona fide* resident of the division, and will be a qualified voter therein before his name can be placed upon the registry?

I answer this in the affirmative.

III. Should the name of a soldier of the United States, temporarily located, but not intending permanently to reside in a division in which he is offered for registry, be placed upon the list of such division?

I answer this in the negative.

IV. What is necessary to constitute *bona fide* residence in the State and election divisions within the meaning of the Constitution and the election laws?

This is answered by the language of the Constitution: A residence in the State of one year, and in the election division for ten days immediately preceding an election, and the payment within two years of a State or county tax, which shall have been assessed at least ten days before the election.

JOSEPH ALLISON.

I concur in the above opinion.

JAMES R. LUDLOW.

The following additional question was submitted and answered on September 20, 1872:

The 27th section of the act of 1869 (registry law) provides for the classification of voters upon the list, as, 1st, "*Private householders*;" 2d, "*Private residents*;" and 3d, "*Taverns*," etc.

Is not a qualified voter, who is a private householder in his division, entitled to be placed on the list under the *first* class, and one who is a private resident, entitled to be placed under the *second* class, notwithstanding the fact, that such private householder or private resident (as the case may be) may also keep a hotel, tavern or restaurant, at *some other place*, wholly distinct from his place of residence?

Judge Allison answered: Wherever a voter lives or resides, there he should be assessed, and he should be placed on the appropriate list, according as he may be a "private householder" or a "private resident." If he is a householder, or a resident in one place, and keeps a hotel, tavern, sailor boarding-house or restaurant in another place, he should be assessed as of the place at which he keeps house or at which he is a private resident, and not as of the place at which he carries on his business.

Judge Ludlow concurred in this answer.

Court of Common Pleas, Philadelphia.

[Leg. Int., Vol. 29, p. 20.]

BICKEL vs. AUNER.

A promise "to be *responsible*" for the contract of another is merely a guarantee and not a suretyship.

Rule for judgment for want of a sufficient affidavit of defence.

This was a suit against defendant for one month's rent, plaintiff alleging that defendant became security for same. The agreement signed by defendant was as follows: "I, Alfred W. Auner, do agree to be responsible to John A. Bickel, or his assigns, for the true and faithful performance of the above-named contract on the part of the above-named Fannie Kensil."

The defendant, in his affidavit of defence, stated: That Mrs. Kensil being a married woman, could not execute the lease; that plaintiff has not brought suit against her; that plaintiff, in his averment, does not state that all his remedies against the lessee have been exhausted.

Opinion delivered *January 13, 1872*, by

ALLISON, P. J.—*Marburger vs. Potts*, 4 Harris, 13, and *Allen vs. Hubert*, 13 Wright, 261, hold that where one agrees to become security for another it is an original and direct undertaking. *Gilbert vs. Henck*, 6 Casey, 205, decides that a promise to be *responsible* for the contract of another is a contingent liability, and becomes absolute by showing due and unsuccessful diligence to obtain satisfaction for the principal. The undertaking here is to become *responsible* for the promise of another, and is therefore ruled by the case of *Gilbert vs. Henck*.

Rule discharged.

John A. Bickel and *George S. Graham*, Esqs., for plaintiff.

John O'Byrne, Esq., for defendant.

[Leg. Int., Vol. 29, p. 53.]

CITY OF PHILA. vs. THE PRESBYTERIAN BOARD OF PUBLICATION.

Where the ashlar or true line of building conforms strictly to the line of the street, but the ornamental parts encroach on it, an injunction will not be granted to restrain such buildings, especially as this has been the custom for years, and councils have not legislated on the subject.

The city solicitor is an independent officer, and may act of his own motion.

In equity. Opinion delivered *February 6, 1872*, by

PAXSON, J.—This was a motion to continue a special injunction. The bill charges that the defendants are now erecting a large granite building on the south side of Chestnut street below Broad, and that the foundation wall of said edifice has been extended fifteen inches beyond the line of said street, as the said line was regulated by act of assembly, approved the 28th day of April, A. D. 1870, and that the said defendants have constructed a pediment upon said foundation wall so extended, and are

about to erect piers and columns thereon, so that the line of said edifice when completed will encroach upon the sidewalk, and will extend fifteen inches to the northward of the line of said street, as regulated by the act of assembly aforesaid. The defendants have submitted the affidavits of John McArthur, Jr., architect of said building, and several others, from which it appears that the ashlar or true wall of said building conforms strictly to the line of said street, and that the only portions of said building which encroach thereon are the ornamental parts and architectural details of the front, such as columns, pilasters, window-headings, door-jambs and cornices, which project over said line from six to fifteen inches.

D. Hudson Shedaker, surveyor of the district, in his affidavit says, he furnished defendants with the line of the street, and that the ashlar or true wall line of the front is being built on the line as furnished by him. That there are several ornamental portions—the front columns with thin bars—which project from the ashlar line on Chestnut street a little over a foot. For the purposes of this motion we must consider it as established that the ashlar or true wall of the front of said building is upon the line of the street, as regulated by act of assembly, and given to the defendants by the surveyor of the district, and that it is only the ornamental portions of the front which project over said line from six to fifteen inches. The question for our determination is, whether such projections constitute such a nuisance as requires the court to interfere by injunction. Of our jurisdiction we entertain no doubt. In the cause of *The City against Friday and Crump*, 6 Phila. R. 275, we held that “any encroachment on the streets of the city of Philadelphia is a nuisance, which will be enjoined at the suit of the city.”

Referring again to the affidavits submitted on the part of the defendants, it is stated by the district surveyor that for many years it has been the universal custom and practice of builders to come out over the line with ornamental works, such as columns, porticos, pilasters, cornices, balconies, window-dressings, door-jambs, throughout the city; this has especially been the case with our public and prominent buildings, and that, before the institution of this suit, no action has ever been taken against any person coming out or attempting to come out over the absolute fixed lines of a street with the ornamental work of his buildings, or architectural additions. John McArthur, Jr., the architect referred to, says: “I have been an architect in this city for upward of thirty years, and during all that time I have been in the practice, in accordance with the universal usage and custom in this city, of putting in my designs, steps, porches, pilasters, balconies, cornices, pillars, and other ornamental features, projecting more or less from the street line upon which I placed the ashlar or true wall line of the building, and of having the building erected in accordance with such designs; and the present is the first instance in which I have known or heard of objection being made, and such, I have no hesitation in saying, has been the general custom and practice with architects and builders.”

The affidavits on the part of the defendant specify a number of buildings, the ornamental portions of which project over the line of the streets from six inches to four feet. Among them may be mentioned the Girard House, the store at the northwest corner of Ninth and Chestnut, the

Continental Hotel, the La Pierre House, the store of Homer, Colladay & Co., Concert Hall, the new offices of the Pennsylvania Railroad Company, Simes' drug store, at Twelfth and Chestnut, and that of Allen's adjoining; the Episcopal book store, Colonnade Hotel, stores of Reeve L. Knight, Samuel R. Phillips, Kerr's China Hall, Bailly & Co., McCallum, Crease & Co., and others.

The act of 28th of April, 1870, P. L. 1291, referred to, provides "that the south line of Chestnut street, between the rivers Delaware and Schuylkill, shall be at the distance of five hundred and thirty-nine feet southward of the south side of Market street. Provided, that this act shall not interfere with any buildings now erected on the south side of Chestnut street."

This act is awkwardly worded, but the manifest effect of it is to widen Chestnut street by taking off five feet from the property on the south side thereof, with a saving clause as to buildings now in existence. As the edifice now in process of construction by the defendants is not strictly a new building, but the alteration of an old one, with an additional or new building in the rear, and a new front on Chestnut street, it may be questioned whether it does not come within the saving clause of the act of assembly above cited. The said building, before the alterations were commenced, stood upon the old line of Chestnut street, and the defendants have, in making said alterations, fallen back to the new line as to everything but the ornamental portions.

But there are other considerations which weigh with us in the determination of this case. In order to have an intelligent understanding of it, we must glance at the legislation upon the subject. The forty-fifth section of the act of the 18th of February, 1769 (Smith's Laws, vol. 1, p. 301), provides that "whereas by late extraordinary encroachments of the cellar-doors, steps and windows, bulks, and other encroachments of the said streets and other encumbrances, the said streets are greatly obstructed, and by a number of spouts or gutters set at the eaves of pent-houses and other places in the said streets, large collections of water are discharged in rainy seasons on persons passing near the same: Be it, therefore, further enacted, that if any person or persons shall hereafter make and set up, or shall cause to be made and set up in any street of fifty feet wide or upward, within the said city, any porch, cellar-door or step which shall extend beyond the distance of four feet three inches into such street, or a proportionate distance into any narrower street, when the same shall be made or set up; and if any person shall hereafter make and set up, or cause to be made and set up any bulk, jut-window or encumbrance whatsoever, whereby the passage of any street shall be obstructed, or shall so place or cause to be placed any spout or gutter, whereby the passage of any street shall be obstructed, or shall be so placed, or caused to be placed, any spout or gutter whereby the passage of any street shall be incommoded, every person offended," etc.

The forty-eighth section of the same act provides: "That nothing contained herein shall be deemed, taken or construed to prevent any person or persons to set up or place any such sign, signboard, pole or other device or thing aforesaid against the wall of their several dwellings, so that the same shall not project or extend into the said streets, lanes or alleys more than six inches."

This was the first legislation on the subject, and was induced, as the preamble to the section first quoted clearly shows, by extraordinary encroachments of various kinds upon the streets of the city, at the same time clearly recognizing some encroachment upon the line of the street for certain purposes, and defining the extent to which such encroachments might thereafter go.

This was followed by the act of the 15th of April, 1828 (P. L. 626), which repealed the forty-seventh section of the act of the 18th of February, 1769, above cited, as to signs, and conferring on select and common councils of the city of Philadelphia the power to regulate by ordinance from time to time, and "to establish such and so many rules and regulations as to them may seem expedient for the better regulation of porches, porticoes, benches, doorsteps, railings, bulks or jut-windows, areas, cellar-doors and cellar-windows, signs, sign-posts, boards, poles, frames, awnings, awning-posts, or other device or projection over, under, into or otherwise occupying the sidewalk or other portion of any of the streets, lanes and alleys," etc.

The fourth section repeals so much of the said act of 1769 as is supplied. Then follows ordinances of councils of September 23, 1864 (Dig. Ord., p. 192), defining what shall be nuisances, the tenth, eleventh and twelfth sections of which refer to projections. By the said section it is declared to be a nuisance: First. To extend or project from any dwelling or building, except inns, any signboard, pole or other device, to denote or show the place of business, or the merchandise or things which the occupant thereof has to dispose of, into or over any of the footways of any street of this city, below the top of the first story to a greater extent than four feet three inches on any of the other parts of each building. Second. To place or maintain any cellar-door, porch or steps, which shall extend more than four feet six inches into any footway of any street of fifty feet wide or upward, of a proportionate distance, into any footway in any street of less width than fifty feet. Third. To set up or maintain any fence beyond the building line; or any railing, except around excavated areas now existing, so as to reduce the footways of streets of one hundred and ten feet and over in width to a width of less than sixteen feet; of eighty feet streets to a width of less than fourteen feet; or sixty feet streets to a width of less than twelve feet; or streets of fifty feet in width to a width of less than ten feet; and of all streets of a less width than fifty feet to a width of less than eight feet; or to project any bulk window more than one foot into the footway beyond the building line; or to put up after sunset and before sunrise any awning below the level of the light in any public lamp.

This is all the legislation upon this subject. The legislature having in terms conferred upon councils the power to regulate the whole matter of projections, that body, as we have seen, proceeds to act upon it, and has declared certain things public nuisances; but councils have not anywhere said that these ornamental projections added to the ashlar line of a building are nuisances. This is, perhaps, of some importance when we bear in mind that at the time when the ordinance of 1864 was passed, and for years before, it was the custom of builders to project such ornamental work over the line of the street. This was done, too,

without a word of objection on the part of the building inspectors, city surveyors, councils, or other city officials.

While such a course of action on the part of builders does not make such a custom as would prevent councils from prohibiting it, nevertheless the silence of councils in regard to it when the practice was well known, and the acquiescence in it by the city authorities for so long a time, would seem to furnish a solid reason why this court should not interfere by special injunction in a case where the building has already been commenced.

The whole subject properly belongs to the city councils. It is competent for them to so legislate as to cover the whole ground, and leave the public in no doubt as to what the rights and duties of the builders are in the premises. So far as they have acted, the necessity of some projection is recognized. Steps and porticos are allowed to project four feet six inches.

If the strict rule contended for here were adopted, it would result in the shaving off of every door, window-head and cornice, projecting over the line of the street. For, if they do not interfere with the foot passenger, they may perhaps limit the light and air.

It was objected, upon the argument, that the city solicitor filed this bill of his own motion, without any action on the part of the building inspectors, councils, or other authorities, upon the complaint of Albert H. Mershon, who owns the store adjoining the one in question. The injunction affidavit was made by Mr. Mershon, and it is stated in the affidavit upon the part of the defendants that the ornamental parts of Mr. Mershon's own building, recently erected, projects beyond the said line of the street.

It was conceded that the bill was filed by the city solicitor of his own motion, after complaint made by Mr. Mershon, with the qualification that it was subsequently approved by the mayor.

We do not propose to decide the case upon this ground, nor do we feel disposed to criticise the action of the city solicitor in commencing these proceedings. Vigilance on the part of public officers in protecting the interests of the city is becoming of so rare occurrence that we prefer to commend, rather than to disparage such action. And it must not be forgotten that the officer referred to is not solicitor of councils or of any of the departments of the city of Philadelphia; and while it is his official duty to answer questions of law properly submitted to him by such departments, and in certain cases to institute legal proceedings under their direction, yet it is equally true that in other cases he may not only act independently of the mayor and councils, but that circumstances may arise which would justify the city solicitor to employ all the power of his department to protect the city against the acts or omissions of the other departments of the municipality.

Injunction dissolved.

George D. Budd, Esq., and Gen. Charles H. T. Collis, for plaintiff.
Sauuel C. Perkins and George Junkin, Esqs., for defendant.

[Leg. Int., Vol. 29, p. 92.]

COMMONWEALTH TO THE USE OF THE GUARDIANS OF THE POOR vs.
JOHN FINKHEIMER.

A judgment of an alderman for the penalty for "violating the first and second sections of the act of assembly, passed February 25, 1855," will not be sustained. The record of the alderman must show that there was some evidence of the acts constituting the offence.

Opinion delivered March 16, 1872, by

PAXSON, J.—This was a certiorari to Alderman Jennings (Twenty-ninth Ward). As we are obliged to reverse this judgment, we will indicate briefly the grounds of our decision. We do so, because it is quite possible there may be other cases depending upon the same principle. The defendant was sued before the alderman, and judgment rendered against him, as we are informed by the transcript, "for violation of an act of assembly passed February 25, 1855, entitled, an act to prevent the sale of intoxicating liquors on the first day of the week, commonly called Sunday, particularly for the violation of the first and second sections thereof, on Sunday, January 21, 1872."

This is all the information furnished by the alderman's transcript as to the nature of the offence committed by the defendant. That it is not enough, is well settled. When a suit is instituted for the penalty incurred by the violation of a specific law, the record must show in what respect the law has been violated. *Commonwealth vs. Fiegle*, 2 Phila. Reps. 215. It is not enough to charge in general terms that the defendant has violated a particular law. The record must show the particular act which it is alleged the defendant has committed, otherwise the court could not decide upon *certiorari* whether such act was a violation of the law referred to. The first section of the act of 25th of February, 1855, prescribes against two distinct offences, viz.:

1. To sell, trade or barter in any spirituous or malt liquors, wine or cider, the first day of the week, commonly called Sunday.
2. For the keeper or keepers of any hotel, inn, tavern, ale-house, beer-house, or other public house or place, knowingly to allow or permit any spirituous or malt liquors, wine or cider, to be drunk on or within the premises or house occupied or kept by such keeper or keepers, his, her, or their agents or servants, on the first day of the week.

Which of these offences did this defendant commit? We look at the alderman's transcript in vain for any information upon this subject. But this record is defective for the further reason that it does not appear thereby, where the alleged offence was committed. It should appear that it was done within the jurisdiction of the alderman. The record is also informal in other respects, particularly in its statement of the plaintiff's name and the parties for whose use suit is brought, and in not stating with certainty when the summons was returnable. But we decide the case upon the ground first above named.

The exceptions are sustained and the judgment of the alderman reversed.

J. Quincy Hunsicker, Esq., for plaintiff.

George H. Earle for defendant.

[Leg. Int., Vol. 29, p. 92.]

IN THE MATTER OF THE EAGLE BENEFICIAL ASSOCIATION.

The holder of real estate subject to a mortgage, is bound only to the condition stated in the recital contained in the mortgage. A mortgage recited "lawful money," the bond was for "lawful silver money:" *Held*, payable in lawful money of any description.

Opinion delivered *March 16, 1872*, by

FINLETTER, J.—This case is presented in the form of a rule to show cause why the society should not satisfy a mortgage upon payment of the principal in legal tender notes.

The association are the assignees of a bond and mortgage, dated April 7, 1831. The bond is in "the sum of \$3000 lawful *silver* money of the United States of America, conditioned for the payment of the just and full sum of \$1500 of like *lawful* money." The mortgage recites as follows: "Whereas the said R. O., in and by a certain obligation, bearing even date herewith, standeth bound unto the said J. S. in the sum of \$3000 lawful money of the United States, conditioned for the payment of \$1500 of like lawful money, etc., as in and by the said recited obligation and the condition thereof, relation being thereunto had may more fully and at large appear." The defeasance clause says, "provided, etc., the said R. O. shall pay or cause to be paid, etc., the aforesaid debt or sum of \$1500."

It must be conceded that the present owner of the land holds it subject to the liability which may arise under the mortgage, which is defined and fixed by the recital and the proviso in the clause of the defeasance. The bond is no part of the obligation or undertaking of the mortgagor so far as the land is concerned, unless it be expressly recited in the mortgage. Upon what principle then should the bond be admitted to enlarge the obligation of the mortgage?

It is contended on the authority of *Croft vs. Webster*, 4 Rawle, 255, and subsequent authorities, that the bond is the principal debt, and the mortgage only a collateral security; and that the holder of the bond and mortgage cannot be called upon to yield up the collateral security before the principal debt (the bond) thereby secured is fully paid.

This is a misapprehension of the character of a mortgage, and of the authorities cited. The principle asserted in *Croft vs. Webster* is, that the mortgagee takes no *interest in the land* by virtue of the mortgage, and holds it as a bare security for the money or condition therein contained. Kennedy, J. says, "a mortgage in Pennsylvania is literally and legally now understood to be but a bare security for the payment of the money or performance of other acts *therein* contained, and at most is only a chose in action. If the mortgagee held a real interest under the mortgage in the land, either of an equitable or legal character, it would be the subject of execution. But it was ruled by this court, in *Rickert vs. Madeira*, 1 R. 325, that the interest of the mortgagee, whether the mortgage was legal or equitable, could not be taken in execution." Whilst, therefore, a mortgage is a security, it is a security only for the payment of the money therein mentioned. It is not a collateral security for the money mentioned in the bond; nor is the bond the principal debt. The bond is the subordinate debt and is merged *pro tanto* in the higher

security—the mortgage—as it would be merged in a judgment obtained upon it.

Even if the mortgage should be regarded as collateral for the payment of the bond, the land bound by the mortgage would be liable only to the extent of the liability of the mortgage itself. The mortgagees would be compelled to satisfy the mortgage upon the payment of its obligations. A collateral security is responsive only to its own conditions and not to any other. If a person hold the promissory notes of A and B for \$500 each, as collateral security for the payment of the note of C for \$1000, will not either A or B be entitled to receive his note upon payment of \$500?

It was further contended that “the mortgage reciting a certain bond was notice to every purchaser of the property of the existence of the bond, and it was his duty, if he wanted to know the character of the bond, to seek information as to its character, the property being bound as security for the performance of the conditions of the bond.” This would be so if the mortgage stipulated to pay the money mentioned in the bond. But if the mortgage calls for the payment of a specific sum and no more, the purchaser of the land was not bound to look beyond the mortgage. That was the instrument which created the lien upon the land. He was not required to look into a subordinate instrument for any condition which necessarily merged in the higher security. Even if he had seen the bond he would have had the right to suppose that the obligee had waived or cancelled the specific conditions of the bond in consideration of the higher and better security of the mortgage.

The mortgagee is bound by the recitals in the mortgage. He undertakes to state the amount and kind of money mentioned in the bond, when he places the mortgage of record, and will be held to have stated it truly. If he errs therein he must suffer the consequence, and not the innocent purchaser who has relied upon the notice which he found upon the record.

The requirement of the mortgage in this case will be satisfied by lawful money of the United States of any description.

Rule absolute.

J. Duross O'Bryan, Esq., for rule.

Joseph R. Rhoads, Esq., contra.

[*Leg. Int., Vol. 29, p. 109.*]

APPEAL OF SAMUEL B. BAILEY FROM THE DECISION OF THE BOARD OF PORT WARDENS OF THE CITY OF PHILADELPHIA.

1. The court will not sanction the act of the board of wardens in granting a license to erect movable platforms.
2. It is inequitable to the rights of adjoining dock-owners, to curtail the width of their docks by such structures.

On October 3, 1870, the board of port wardens granted a license to Philip Fitzpatrick to erect a wooden platform alongside of his wharf, at Catharine street. On October 23, 1870, the present appellant being the adjoining owner, filed a bill in the Supreme Court for an injunction to restrain the erection, the time for appeal (thirty days), having expired, and there being an allegation of want of notice to Mr. Bailey, upon

February 4, 1871, Judge Sharswood delivered an opinion (vol. 28 Leg. Int., p. 77) allowing the bill to be amended by making the board of wardens codefendants, at the same time suggesting an application to the board to reopen the decision and rehear the case. This was acquiesced in by all parties. The board heard both sides fully in person, and through counsel, and on April 3, 1871, confirmed their former decision, and issued a new license to Philip Fitzpatrick, whereupon Samuel B. Bailey appealed.

The petition stated: "That the board of port wardens for the port of Philadelphia, on the 3d day of April, 1871, granted to Philip Fitzpatrick, his heirs and assigns, authority to build a temporary platform eighteen feet wide, extending eastwardly from the bulk-head sixty-three feet four inches to the end of the old pier, on the north side of the present pier, situated near Catharine street, Delaware river; provided the said Philip Fitzpatrick agrees to waive all his rights to that portion of the dock opposite to the said platform, and give to S. B. Bailey the free and exclusive right to the use of the dock as long as the platform remains built; and further provided, the said platform to be removed by Philip Fitzpatrick, his heirs, executors, administrators, or assigns, at his or their cost and expense, within thirty days after due notice be given so to do," as appears by an exemplification of the license.

And your petitioner further sheweth that, being much aggrieved by said decision, he has appealed from said decision in accordance with "a further supplement to an act passed March 19, 1803, to establish a board of wardens of the port of Philadelphia, and for other purposes," approved April 8, 1868, and in further pursuance thereto he presents this petition setting forth the grounds of his complaint.

And your petitioner further sheweth that he is seized in fee of a wharf one hundred and eighty feet in length, next adjoining on the north the pier of the above-named Philip Fitzpatrick, and between which piers there is a dock only fifty feet in width.

And your petitioner further sheweth that, by section 28 of an act approved February 2, 1854, P. L. 27, it is enacted that it shall be the duty of the councils of the city of Philadelphia, "after the requisite soundings and surveys shall have been made, to fix the lines beyond which no wharf or pier shall be constructed, and to keep the navigable water within the said city forever open and free from obstruction. The councils shall authorize the construction of wharves upon a plan and scale to meet the demands of commerce, keep the same and the avenues leading thereto open and free from obstruction, . . . and may enact ordinances for the purposes in this section mentioned."

That said councils in the performance of said duty imposed upon them as above, by "an ordinance to fix the lines on the Delaware river, between Frankford creek on the north, and the Point house wharf on the south, beyond which no wharf or pier shall be constructed," passed December 4, 1856 (Ord. of 1856, p. 299), did establish the line required by said act of 1854, and which said line, as established, was recognized by section 3 of an act of April 15, 1858, P. L. 275, and by said ordinance did further ordain and enact:

"Section 3. It shall not be lawful to extend any wharf now built, or construct any new wharf, except in accordance with the following pro-

visions, viz.: each and every wharf shall, when extended to or near the wharf line hereby established, consist of a *solid pier* not less than forty feet in length, . . . to be supported on piles extending to the elevation of low water, upon which shall rest the *crib of the wharf*;" and by section 4 it is enacted that "no new wharf shall be erected on the Delaware front that shall not have *clear dock room* on each side appertaining to such particular wharf of forty feet in width."

And your petitioner further sheweth, that the platform authorized as aforesaid, would, if built, leave only thirty feet of the dock or water surface between the wharf of your petitioner and said platform, and that the same would not be a solid structure as required by the ordinance above cited.

Your petitioner therefore assigns the following grounds of complaint:

I. That he is advised that the board of wardens have no power to authorize the erection of a platform into the river Delaware.

II. That he is advised that the board of wardens have no power to authorize structures in the river Delaware which contemplate removal on notice.

III. That he is advised that the board of wardens have no power to authorize the erection and building of a platform removable on notice, unless there shall be appertaining thereto forty feet of dock or water surface on the side; whereas, said platform, if built, will have only thirty-two (32) feet.

IV. That he is advised that the board of wardens have no power to impose the conditions which are contained in the provisos accompanying said license.

V. That said platform, if built, will increase the perils of navigation to vessels coming into the dock of your petitioner, and by making the approach less easy, will diminish the value of his said dock and pier.

Your petitioner therefore prays your honors that, after proceeding in such manner as conformable to the act under which this petition is presented, that such order shall be made as your honors may think said board of wardens should have made on the application of the said Philip Fitzpatrick for authority to build such platform."

Opinion delivered *March 23, 1872*, by

PEIRCE, J.—This appeal is from the decision of the port wardens, in granting the following license to Philip Fitzpatrick:

"*Know all men by these presents*: That at a meeting of the board of wardens for the port of Philadelphia, held at this office, in the city of Philadelphia, on the third day of April, A. D. 1871, the said board of wardens by the authority vested in them by the laws of the United States and the laws of the Commonwealth of Pennsylvania, authorized, and by these presents do authorize Philip Fitzpatrick, his heirs, executors, administrators or assigns, to build a temporary platform eighteen feet wide, extending eastwardly from the bulk-head sixty-three feet four inches to the end of the old pier on the north side of the present pier, situated near Catharine street, Delaware river: *Provided*, the said Philip Fitzpatrick agrees to waive all his rights to that portion of the dock opposite to the said platform, and give to S. B. Bailey a free and exclusive right to the use of the dock as long as the platform remains built:

And further provided, The said platform to be removed by Philip Fitzpatrick, his heirs, executors, administrators or assigns, at his or their cost and expense, within thirty days after notice be given by the authorities so to do. Subject to the laws of the State of Pennsylvania, ordinances of the city councils, rules and regulations of the board of wardens for the port of Philadelphia.

"The materials and construction of said platform to be approved by the wardens, and three days' notice to be given in writing to the officers of the board previous to the sinking of the same."

The appellant, Samuel B. Bailey's wharf, is the wharf next north of Philip Fitzpatrick's wharf. Its length on the side of Fitzpatrick's is one hundred and eighty-one feet or more. The width of the dock between Bailey's wharf and Fitzpatrick's wharf, for sixty-three feet of the distance, at the point where the proposed platform was to be erected, is fifty feet eight inches, and for the remainder of the distance is over seventy feet. The proposed platform would reduce the width of the dock for sixty-three feet of its length at the west end, to thirty-two feet eight inches. And Fitzpatrick proposes to relinquish to Bailey the exclusive use of this portion of the dock. The appellant objects that, reducing the width of the dock sixty-three feet of its length to thirty-two feet eight inches, is depriving him of the use of his wharf for vessels of a large class for its whole length. We think that the evidence sustains this view of the case. The testimony shows that the dock, as it now exists, will accommodate a vessel of forty-five feet breadth of beam; but if the platform were erected, a vessel of that size could not lie at the wharf without projecting her stern into the stream some distance beyond the end of the wharf, at the risk of being run into by passing vessels, and by the ice in the winter season. These wharf-owners have concurrent rights in the dock, and to deprive one of the lawful use of the dock and wharf, that another may have more room for the storage of cargo, seems so inequitable, if not illegal, that it cannot be justified.

The proposed platform appears, also, to be in violation of, or not within the provisions of the city ordinance of December 4, 1856, which directs in what manner wharves shall be constructed. And is clearly against the policy of the law, as is indicated by the act of 24th of March, 1832, which directs the mayor, aldermen and citizens of Philadelphia to require all platforms projecting into the river Delaware, and supported on piles, pillars or piers, to be removed; and to prohibit the construction in future of any such projecting platforms. Though this act, when passed, was applicable only to the old city proper, it clearly indicates the policy of the legislature respecting such structures.

It is not necessary, however, to decide the power or authority of the port wardens to authorize such a structure. In our opinion, it is so clearly against equity, and the right of the appellant, that this appeal must be sustained.

Decision of the port wardens reversed, and the appellee ordered to pay the costs.

David W. Sellers and James W. Paul, Esqs., for appellant.

Pierce Archer, Jr., and William M. Hirst, Esqs., for appellees.

[Leg. Int., Vol. 29, p. 109.]

ASHTON vs. GLASS.

Defendant is entitled to claim exemption under an attachment execution.

Opinion delivered *March 30, 1872*, by

PAXSON, J.—This was a rule to show cause why the claim of the defendant to exemption should not be allowed *nunc pro tunc*, as against the attaching creditor. That a defendant is entitled to exemption upon an attachment sur judgment is well settled. The latter is strictly execution process, and this plastic form has been incorporated into our law, in order to render the process more searching than the ordinary form of execution. But it is alleged that the record here shows no claim to exemption, and that as there is now judgment against the garnishee, it is too late to come in and make the claim. *Strouss vs. Beecher*, 8 Wr. 206; *Blair vs. Steineman*, 2 P. F. Smith, 423; *Zimmerman vs. Brines*, 14 Wr. 535; and *Rushworth vs. Swope*, Legal Gaz. R. 213. But the depositions show that prior to the return of the attachment, the claim for exemption was duly served upon the sheriff, and that deputy sheriff Stokes stated that he would not allow the claim unless he received \$20 in advance. The sum in the hands of the garnishee is but \$55. We think the claim was in the time. The defendant is not to be deprived of his exemption by either the carelessness or the cupidity of a deputy sheriff. It was urged that the defendant is not injured, as he has his action against the sheriff. But to turn him over to his action for this small sum would be practically to deprive him of his claim under the exemption law. We prefer to correct this matter here, which we do by making this rule absolute.

[Leg. Int., Vol. 29, p. 141.]

CONRAD vs. CONRAD.

A bill of review will not be allowed where complainant alleges that he has discovered a writing, no proof of the contents of which had been offered at the trial, or any evidence presented that search had been made for it.

Motion for leave to file a bill of review. Opinion delivered *April 27, 1872*, by

LUDLOW, J.—A bill of review was filed in this case, after a decree had been made in this court, and pending an appeal to the Supreme Court.

Before this hearing the appellate court affirmed our original decree, and now we are asked to open the case and to permit further litigation.

This bill of review ought not to have been filed without leave of the court upon petition and affidavits, and it might have been stricken from our records; the judge who heard this motion, however, permitted it to stand as and for a petition. The bill itself is, however, defective in several particulars, and treating it as a petition, its prayer not even containing an offer to pay costs, would have to be rejected.

In order, however, to do justice between the parties, we have looked, not at the volume of evidence which has incautiously been taken in this cause, but at the substance of the matter contained in the bill and the affidavits, upon which alone leave to file a bill of review may be granted.

The settled rule is that where it is alleged that new and relevant matters of fact have been discovered, such new poof must have come to light after decree made, and must be such as the party could not possibly have used at the time the decree passed.

The court in *Riddle's Estate*, 7 H. 433, say that this rule has never been departed from; the decision was repeated in *Hartman's Appeal*, 12 C. 70. This is our law, and is but a statement of a principle uttered as far back as the time of Lord Bacon, and reiterated since that time by judges and text writers innumerable. See *Livingston vs. Hubb*, 8 John. Ch. 125.

Any newly discovered evidence, therefore, which by due diligence could have been heretofore presented, ought to have been produced, and a very mild application of an established rule must utterly destroy complainant's case.

We are now told that an agreement in writing has been discovered, signed by the defendant in the original bill, which, if genuine, gives away his case.

Let us look at the evidence of the plaintiff himself in the proceedings had under the original bill; on cross-examination (printed in the paper book of the complainant, page 14), he says: "When the \$5000 mortgage was made, then it was that he agreed to look only to the Jersey property mentioned in the bill for its satisfaction, the agreement was not in writing." . . . "I had a distinct understanding with Henry Conrad that he was to look to the farm alone for payment of his mortgage of \$4000; the agreement was made at my office." In a note printed at the foot of page 14 of the paper book, it is stated, that the question propounded was: Was this agreement made in writing at the time? *Answer*: No, it was not. Here the witness was interrupted, and the answer written as above stated.

In the bill now filed, sec. 8, the complainant states that "within the last twenty-four hours he has discovered a piece of evidence which he had supposed and believed to be lost, and which it was entirely out of his power to produce on the hearing of his proofs in this cause."

In what I suppose to be the injunction affidavit now filed, he says: "This paper I have looked for; I found it among some searches in an envelope; I suppose it has been in my house ever since it was read. . . . I looked very much for it everywhere I thought it could be at the time of the trial."

In another affidavit, Osborne Conrad says: "I can't say where it (the paper) has been. I have looked frequently for it. I knew there was such a paper." Another witness says: "I showed it (the paper) to Henry Conrad; he said: 'that looks very much like my signature.' I said: 'do you know that is your signature?' He said: 'it looks very much like it.'"

Upon such affidavits as these we are now asked to permit a party to file a bill, the object of which is to open a decree of this court solemnly affirmed by the decree of the Supreme Court.

That we ought not to permit this course to be taken seems to be evident, and that we cannot do so is clear, if we are to regard the settled principles of law as administered both in common law courts and in equity.

Suppose this case had been tried before a jury, would any court grant a motion for a new trial, based upon an alleged discovery of a paper as important as the one now before the court, strict proof of a search not having been offered at the trial, and no effort having been made to prove its contents? If at law the plaintiff could not succeed, why should a court administering equity permit a decree now to be opened, in a case in which the complainant did not make proof of a diligent search, made no offer to prove the contents of the agreement, stated that it was not in writing, but that he had "a distinct understanding," and now admits that he had looked frequently for it, and did so when he thought "it could be at the other trial?"

Taking the sworn testimony of the complainant under the original bill, and contrasting it with his affidavits now before us, we must come to one of two conclusions: either the complainant did know of the existence of this agreement at the former hearing, and because he could not find it, purposely concealed the fact of its existence, and made no effort then to remedy the difficulty; or he did not know of the existence of the paper, and therefore made no search for it, and then testified in regard to matters of fact of which he had no certain knowledge.

We are driven to the conclusion by the testimony and affidavits of the plaintiff himself that the first conclusion is the correct one, and thus the complainant by his own conduct has settled the question now at issue against himself.

Even should this agreement be a valid one, we would do injustice to ourselves should we permit one who asks equity to receive it, when we must conclude from the evidence before us that he has himself neglected to do that which he was in equity bound to perform.

We say nothing of an affidavit submitted by the defendant, because it is not legally before us; it is but right, however, to notice the fact that he declares the signature to the agreement to be a forgery, or, if genuine, that it was obtained from him by a fraud, and that he never executed knowingly this agreement.

We might go further, and with little effort prove that the testimony now offered is, upon other grounds, not such as can be received to open this decree; enough has, however, been said to enable us to come to the conclusion that a formal petition, accompanied by the affidavits now before us, ought to be dismissed; and without intending to establish the practice adopted in this case as a precedent, but for our present purposes and to avoid further cost, treating this bill as a petition, we dismiss it with costs, and thus terminate so far as we are concerned this litigation.

H. R. Warriner, Esq., for complainant.

J. A. Burton, Esq., for defendant.

[Leg. Int., Vol. 29, p. 172.]

WINSOR *et al.* vs. CLYDE *et al.* STETSON *et al.* vs. WINSOR *et al.*

1. Property in the name of a trade or business has become as well established as in any other thing.
2. Title to property in the name "KEYSTONE LINE," acquired by many years' *certain exclusive appropriation* and use of it by shippers of merchandise, who did not own the vessels employed by them, will be protected in equity.
3. The use of the name while the shippers were agents for a steamship company, is a mere license and gives no right to its use after the agency is terminated.

In equity. Opinion delivered May 21, 1872, by

FINLETTER, J.—These bills have been discussed and will be considered as cross bills. In each there is a motion for a special injunction to restrain from using the name "Keystone Line."

Property in the terms, names and devices of trade and business has become as well established as property in any other matter or thing. It is based upon and controlled by the same general principles to which all property is subjected, and has no laws special to itself. The litigation which springs from it is rather for the decision of facts, than for the establishment of peculiar or unknown principles.

In a word, it is personal property, and has all the incidents thereof. It is acquired by certain exclusive appropriation, continued use, descent or purchase, and may be relinquished by gift, sale or abandonment.

Its fraudulent appropriation, though no less reprehensible in morals than the felonious taking of other personal property, has not yet become the subject of investigation and punishment by courts having jurisdiction of crimes. It is this, perhaps, which has made equity eager to arrest the spoliator *flagrante delicto* by its swiftest and sternest authority. In the present investigation the title to the property of the name of "*Keystone Line*" is the only subject of dispute. From the bill and the affidavits it is clear that in 1857 Stetson & Co. began a general freighting business. They were shippers of merchandise by means of vessels which they did not own, but of which, whilst in this port, they had the entire management. They adopted a uniform style of bills of lading; collected the bills of freight; and superintended the loading and unloading; and charged a commission on shipments secured and bills collected. They had a fixed place of business, and the necessary agencies to carry it on in a business-like manner. They established several lines; each of which was designated as "*Keystone Line for —,*" the place to which the lines extended. These lines were continuously and extensively advertised, and became well and favorably known to the community by these names. They were in fact the link between the carriers of freight and the shippers.

The practical usefulness of their employment in such a port as ours raises it to the dignity of a business or calling.

They have given it their energies and means, and that which fifteen years ago was a vague hope has now become a splendid success. The name by which they individualized their employment at the outset, they have ever since retained, and it still designates their business in contradistinction to that of all others engaged in the same pursuit. If this name has become property, who should enjoy it? Surely those who first adapted it to their special business; who became known by it to the pub-

lic; who have unceasingly adhered to it; and who, by their own efforts, have made it valuable. What higher title has the farmer to the harvest which he has sown and reaped and garnered? What better claim has the manufacturer to the web he has spun and woven? It is contended that inasmuch as they do not own the vessels, and never did, they cannot have "lines of vessels," and they are therefore practising a delusion and a cheat upon the public, and should not be protected in the means by which the fraud is perpetrated. This assumes the fact to be that the business in which they are engaged cannot be conducted by them unless they be the owners of the vessels. At the same time it entirely ignores the fact that they have so conducted it, and successfully too, for fifteen years.

But what do they propose to owners of freight by their "Keystone Line?" A line is one or more vessels which leaves a certain place at a certain time for a certain place. He who undertakes to carry freight or passengers by such a line can do so either by his own or the means of others. How do the various well-established express and transportation lines conduct their business? Not in any case by railroads which they own. That which the transporter of freight on land may do, cannot be a fraud in the transporter of freight on the high seas.

Who complains that he had been deluded by them? Who complains that they have ever failed in the performance of any of the promises they have made; or in any of the obligations which expressly or impliedly arise from the name or names by which their business is made known?

Winsor & Harding claim "that for a period of four years a line of steamships had been running between Philadelphia and Providence, engaged in the general freighting business, which was known and called "The Keystone Line," and was advertised by that name in the newspapers and in handbills, and by that name was known to the shippers of goods who were accustomed to consign goods for shipment by that line, under that name, and that they have become owners of said line.

"That the name 'Keystone Line' was adopted for the said steamships, at, or about the time the said Stetson & Co. became the agents thereof at Philadelphia, several years ago, and with their consent if not at their request.

"That the said Stetson & Co. had no interest in the said steamships, or any other vessel belonging to that line, and that after assenting to the use of that name by the vessels composing that line for many years, under which a large trade has been drawn to those vessels and that line, they cannot be allowed to assert property in or any right to use that name as against the line of steamships running to Providence, which was so named with their consent and approval." This constitutes the whole of their objection to the use of this name by Stetson & Co., and the whole of their own right to its exclusive use. It will be seen that they do not in terms, assert an exclusive appropriation of the terms "Keystone Line."

Permitting it to be so designated by others is not enough to entitle them to the exclusive use of the name. There must be in some way the assertion of the right of exclusive use. But if it be conceded that they have shown an adoption of the name, it is still necessary that they

should show an exclusive right to use when so adopted. The word "Keystone" being common and in common use, they must show that they first appropriated it to the present use—the identification of a line of vessels carrying freight; or that they have derived the right in some legal way from those who had the power to pass it to them. In June, 1867, the "Hunter" and "Chase," plying between this port and Providence, under the name of the "Empire Line," were placed under the charge of Stetson & Co., who advertised them as the "Keystone Line." At the expiration of a week, the owners directed that they should not be so advertised. Since June 19, 1867, notice of their sailing and all published information regarding them, have been headed "Philadelphia & Providence Line of Steamers, semi-weekly line to Providence, Boston and Worcester;" advertising cards and the signs at piers Nos. 2 and 3, simply contained the name "Philadelphia & Providence Line of Steamers." If, however, Stetson & Co. had permitted the assignors of Winsor & Harding to use the name, and they had exercised the privilege still, it was a revocable license, and confirmed no right after it was withdrawn. If this were otherwise, as a general proposition, still, under the facts of this case, it could only have been a license to use the name while Stetson & Co. were conducting the business, and ceased when their connection from any cause terminated.

The conclusions to which we have come are:

1. That a title to the name "Keystone" is in Stetson & Co., as claimed in their bill.
2. That Winsor *et al.* have not shown title to the name "Keystone," as claimed in their bill.

A special injunction is therefore decreed against Winsor *et al.*, as prayed for in the bill of Stetson *et al.* filed against them.

The motion for a special injunction, as prayed for by Winsor *et al.*, is refused.

M. P. Henry and R. C. McMurtrie, Esqs., for Winsor et al.
Samuel Dickson and Charles Gibbons, Esqs., for Stetson & Co

[Leg. Int., Vol. 29, p. 188.]

FORBES vs. DALLETT.

Where several barrels of a cargo were delivered empty, and the bill of lading provided that freight should be "payable on each and every barrel delivered full, not full, or empty," the burden of proof is upon the party seeking to charge the carrier to show that the leakage was the result of negligence.

Sur rule for a new trial. Opinion delivered June 8, 1872, by PAXSON, J.—On the sixth day of May, 1870, Messrs. Dallett & Son, defendants, merchants of this city, shipped on board the brig "Josephine" forty barrels of refined petroleum, to be delivered at the port of Barcelona, Spain, to the order of the shippers. The form of the bill of lading was evidently a special one, prepared by the latter, and contained a clause providing that the master should not be answerable for "leakage or breakage," and also that freight should be "payable on each and every barrel delivered full, not full, or empty." The charter party contained substantially the same provisions. The plaintiff proved the delivery of the forty barrels at Barcelona; and the further fact that the consignee deducted, against the protest of the master, the freight upon

seven barrels for leakage, alleging that the said seven barrels were empty. The balance of the freight was received by the master from the consignee, and this suit was brought by the former against the shippers, to recover the freight upon the said seven barrels. The jury found for the plaintiff. The defendants allege that there ought to be a new trial, because, 1st. The master having relinquished his lien for freight against the consignee, cannot recover against the shippers. And 2d. That the burden of proof was upon the plaintiff to show that the leakage was not caused by his negligence, and that there was no evidence to rebut the presumption of such negligence.

We do not regard the first point as well taken. The shippers were primarily liable to the master for the freight. If the latter delivered the cargo to his consignee without prepayment of the freight, his lien upon said cargo was undoubtedly gone. But he still had his remedy against the shippers, upon their contract of affreightment. *Abbott on Shipping*, *414; *Layng vs. Stewart*, 1 W. & S. 222.

The authorities cited by the learned counsel of the defendants upon the second point all refer to the common law doctrine that the carrier is an insurer of the goods intrusted to him, excepting so far as they are damaged by the act of God or public enemies. But this case does not rest upon this common law principle. The duties and liabilities of the master are limited and controlled by the special contract embodied in the bill of lading. A common carrier may not relieve himself by special contract from fraud or negligence. He may, however, stipulate against certain risks, and when he shows that the loss occurred by reason of one of the excepted causes, he is not liable. In such case the *onus probandi* is upon the party seeking to charge the carrier, to show that the loss was the result of negligence. These principles are fully sustained and discussed in *Farnham vs. Camden and Amboy R. R. Co.*, 5 P. F. S. 53; and *Patterson vs. Clyde*, 17 P. F. S. 500, where the authorities are well collected.

In this case the consignee claimed to deduct the freight by reason of leakage, one of the excepted perils. This brought the case within the precise terms of the bill of lading. There was no evidence in the case to show negligence on the part of the master, and under the special contract referred to the law will not presume negligence from the mere fact of leakage.

Rule discharged.

Henry M. Dechert, Esq., for plaintiff.

Elias L. Boudinot, Esq., for defendant.

[Leg. Int., Vol. 29, p. 196.]

CANDY vs. CANDY.

A case will not be referred to an examiner on the respondent's application where she has had full and ample opportunity to testify.

Opinion delivered June 1, 1872, by

FINLETTER, J.—This is a rule to show cause why a divorce *a vinculo matrimonii* should not be decreed.

The testimony shows conclusively that the respondent wilfully and maliciously absented herself from the habitation of the libellant for more

than two years and still persists in said desertion. If it had been more full and particular in details, especially as to the manner in which she left her husband's house, it would have been more satisfactory. There were, however, no witnesses present at or about that time, and the libellant is precluded from testifying, as there was no personal service of the subpoena. It is not likely, therefore, that this deficiency could be supplied, and in this particular, nothing would be gained by sending the matter again to the examiner.

Upon the argument it was alleged by the respondent's counsel that she could rebut the testimony of the libellant if the case was referred to the examiner. Under the circumstances we do not think she is entitled to this indulgence. On the 18th day of June, 1871, she filed her answer, and on the 16th day of February, 1872, she filed cross-interrogatories. Testimony was taken by the examiner on the 23d and 28th of February, 1872, at which time her counsel attended and cross-examined the witnesses. It was evident from this that she had ample time and means to present her defence, whatever it might have been. There is no reason why suitors in divorce cases should not be held to some degree of diligence, or that on the other hand they should be unnecessarily subjected to the expense and annoyance of perverse and procrastinated litigation. It is our duty to see that these suits are properly prosecuted, and that the testimony brings each within the acts of assembly. At the same time it is equally our duty to see that the order and decorum which attends all other litigation should not be wholly violated. The respondent has staked her defence upon the weakness of the testimony of the libellant. If in this speculation she has failed, it is no fault of ours. If she had a better one in the facts within her knowledge she has not acted in good faith to the court, and must take the consequences. It is the frank and honest suitor who merits and will receive discretionary indulgence.

The rule is made absolute.

L. R. Fletcher, Esq., for libellant.

E. E. Petit, Esq., for respondent.

[*Leg. Int.*, Vol. 29, p. 196.]

HANLON vs. BIBLEY.

The record of a suit in the District Court showing the amount in the hands of the garnishee will be received in evidence in this court in another attachment against the same garnishee.

Opinion delivered June 1, 1872, by

FINLETTER, J.—This was an appeal by the garnishee from the judgment of the alderman.

Upon the trial the plaintiff offered in evidence the record of a suit in the District Court, in which George Kinsinger was plaintiff, and Samuel Elliott was defendant, and Bibley garnishee. The defendant was not served. The garnishee was attached and appeared and defended. "October 19, 1870, verdict for plaintiff for \$72.91; in hands of garnishee \$157.50. December 21, 1870. Rule for new trial discharged. January 7, 1871. Jury fee paid and judgment."

The attachment in this case was issued and served before the rendition of the verdict in the District Court. The garnishee objected to the admission of the record, and the objection was overruled. This ruling is alleged to be error.

So far as the garnishee is affected by the suit in the District Court, it is obvious that the only question in which he could have any interest, was the amount of money in his hands the property of the defendant. He was regularly brought into court to answer the issue, and contested it through all its stages to final judgment. Why should it not be conclusive against him? There is no rule of legal practice of higher value than that which arrests the strife of litigation by declaring that one suit and judgment therein is an end of controversy as to all matters put in issue, and which ought to have been put in issue. *Rockwell vs. Langley*, 7 Harris, 508. To bind a party to a judicial proceeding all that is necessary is, that he should have had a right to appear and be heard: 1 Stark's Evid., Part 2, secs. 57-60; 1 Greenleaf's Evid., secs. 523-528.

Breeding vs. Sergworth, 5 Casey, 396; *Tams vs. Bullitt*, 11 Casey, 308; and *King vs. Faber*, 1 P. F. Smith, 392, rule that a verdict and judgment in favor or against a garnishee in an attachment is no bar to another by a different creditor. This, however, is upon the ground that they are not parties, and of course cannot be heard. In *Tams vs. Bullitt*, Lowrie, J., says: "It is not easy to see how creditors can be barred by a proceeding to which they were not parties."

It has been urged that inasmuch as the plaintiff in this case could not have been bound by the judgment in the District Court, the garnishee should not be. It might be sufficient to say that the plaintiff has concluded himself by accepting that judgment. If a more satisfactory reason be required, it is given by Armstrong, J., in *Breeding vs. Sergworth*. "Every general law, however, and every general rule, will occasionally produce individual hardship. But the hardship must sometimes yield to the policy of the law, which has for its object the general good."

There was no error in the admission of the record of the District Court, and the rule for a new trial is discharged.

E. R. Worrell, Esq., for plaintiff.

William Hopple, Jr., and *Byron Woodward, Esqs.*, for defendant.

[Leg. Int., Vol. 29, p. 212.]

JAMES B. FERREE vs. THE BOARD OF SURVEYORS.

The action of the board of surveys under the act of June 6, 1870, is subject to the right of appeal to the court, and relief in equity will not be granted.

Motion to continue injunction. Opinion delivered June 29, 1872, by ALLISON, P. J.—The councils of the city, on the 29th of December, 1870, by resolution, directed the department of surveys to prepare plans revising the lines and grades of streets intersecting and adjacent to lines of the Pennsylvania Railroad between Bridge street and Pennsylvania avenue.

It is charged in the fifth section of the bill that such plan has been prepared, and that the board of surveyors propose on a day certain to examine and to confirm or reject the plan thus prepared.

Relief is prayed for on the ground that as prepared the plan is in excess of the authority conferred upon the board, because it proposes to cut off and vacate portions of streets laid down on this part of the confirmed plan of the city, and that it contemplates the laying out of new streets, etc. It is contended that the order of councils to revise lines and grades of streets does not carry with it the power to vacate or lay out new streets. By the act of June 6, 1870, P. L. 1353, the board of surveyors are empowered to examine and finally confirm or reject all plans of survey or revision of plans made under the direction of the councils of the city. The second section directs that the board shall take no final action on said plans until public advertisement shall have been made in three newspapers of the city, six times in each of them, during the thirty days immediately preceding the proposed action, and that notice by hand-bills be also given for at least thirty days prior to the proposed hearing: to be posted throughout the area covered by the plan proposed to be considered. A plan confirmed after said notice and hearing is declared to be final and conclusive and without appeal.

The third section provides that no new street shall be added to any confirmed plan of the city, and called a public street, until the same shall have been approved by the board of surveyors, and to this is added the following: *Provided*, that an appeal may be taken to the Court of Quarter Sessions of Philadelphia, at any time, within three months after said board of surveyors shall have finally confirmed any plan as aforesaid, when said court may, after a hearing, confirm said plan as submitted, or remand it back to the board of surveyors for reconsideration or revision.

The conclusion at which we have arrived as to the true intent and meaning of this proviso renders it unnecessary at this time to consider the other questions which were presented at the argument. We may merely say, however, in passing, that we do not agree with the plaintiff, that the act of June 6, 1871, is unconstitutional, because it contemplates setting aside a decree of this court made several years since, confirming the plan now sought to be changed. ■

The decree was not a judicial sentence or judgment between citizens litigant before the court, it was an order affecting public interests, in which individuals were interested, but to which they were not parties in the usual sense of the term. The regulation and use as well as establishing, changing, and the control of highways may be said to be under the absolute control of the Legislature. To this extent the Supreme Court has gone in passing upon the question of legislative power over public streets. It would be assuming too much if we should hold that because the Legislature at one time said our decree confirming a public plan of the city should be final and unalterable, that at a subsequent time the Legislature might not repeal such a law, and subject a plan thus confirmed to revision and change. The order of confirmation merely establishes a municipal regulation, it therefore is not a judgment in a suit between individuals.

But to return to the question of the effect and operation of the *proviso* to the third section. The second section had declared the confirmation of plans by the board of surveyors to be final and without appeal, and yet the proviso subsequently added expressly authorizes an appeal to

the Court of Quarter Sessions after final confirmation "of any plan as aforesaid." Is this right of appeal to be restricted to the case of a new street added to a plan, or was it the intention of the Legislature to extend that right to all plans of revision and new plans made under the authority of councils of the city?

An examination of the third section will show that it does not treat of a revision or the making of new plans; nor does it speak of confirmation of plans by the board of surveyors. It looks to a necessity which may arise for adding a street to a confirmed plan, and to prevent the establishment of new streets by dedication or otherwise by individuals, which shall become public highways and as such be placed on a confirmed plan. It provides that no street shall be added thereafter to such plan and "*be called a public street*" until the same shall have been approved by the board of surveyors. This is the entire range and operation of the third section. It does not treat of plans of revision, or plans of a section of territory upon which streets and highways have not before been plotted, which had been confirmed by the court, or after the passage of the act of April 6, 1871, by the board of surveyors. There is, therefore, nothing upon which the proviso can take effect if it be restricted in its operation to the third section, unless it is made to apply to the adding of a street to a plan already confirmed. This section does not in terms direct that adding a new street to an established plan shall require anything more than that it shall be approved by the board of surveyors, whether it falls within the spirit of the first and second sections, and whether it must be ordered by councils and a plan made of it by the surveyors, and be subject to the provisions of the second section, as to notice, are questions which it is not necessary to decide in this case. There is much that could be said in support of the affirmative of this proposition; but it is sufficient upon the point before us to repeat that the third section does not say that adding a street to a confirmed plan shall be treated as a plan, requiring notice and confirmation of the board. It is, therefore, clear to us that the proviso was intended to reach back to the first and second sections, and that the words "any plan as aforesaid," must necessarily mean the plans which had previously, or as aforesaid, been legislated upon; and these are plans of revision and new plans, and possibly, by implication, plans of added streets. There is certainly nothing to exclude the plans referred to in the preceding sections, from the operation of the proviso, except the concluding paragraph of the second section, which declares the confirmation by the board of surveyors shall be final and conclusive and without appeal. We have, therefore, in this act, two contradictory and wholly irreconcilable provisions: the first affirming that from the final action of the board of surveyors there shall be no appeal, and the last declaring that an appeal may be taken within three months after said board shall have finally confirmed any plan as aforesaid.

It is a principle regulating the interpretation of a statute that a construction shall be given to it which will give effect to every portion of the act if it is possible to do so; but if this cannot be done, the law must be interpreted to be what is most consonant to equity and least inconvenient. *Kerlin vs. Bull*, 1 D. 178. And where it is impossible to reconcile conflicting portions of the act, if the last clause is reasonable

and can operate on that to which a preceding contradictory clause was intended to apply, then the last intention of the Legislature must control and govern that which preceded it. Looking at the proviso we find a most reasonable regulation favoring the general right of appeal as to interest, which are vital to the community and of the first importance to the citizen. It embodies the second and more reasonable thought of the Legislature upon the question as to whether the judgment of the board of surveyors shall be final and conclusive, with no power in any one feeling himself injured to seek redress by appeal. It declares that though by the second section the evident purpose of the draftsman of the act was to change the law as it had existed from time immemorial, that in this respect the law should remain as heretofore; that a right which had been regarded as of the utmost value, and as fundamental, should not be taken from the citizen, but that he should still exercise the privilege of appealing to the constitutional courts of the Commonwealth for redress of grievances.

These and other considerations make it clear that the intention of the Legislature was to give an appeal from every judgment of the board of surveyors confirming finally any portion of the plan of the city, and that the plaintiff has therefore his statutory remedy by which he may bring up for decision by this court the questions which are raised by his bill. The existence of this legal remedy is a denial of his right to relief in equity, and for this reason the preliminary injunction must be dissolved.

J. Cooke Longstreth, Esq., for plaintiff.

George D. Budd, Esq., and *Charles H. T. Collis*, city solicitor, for defendants.

[Leg. Int., Vol. 29, p. 317.]

SHAY vs. SHAY.

Where proceedings in divorce have been carried on regularly, the respondent appearing and taking part therein; until the entry of the rule for divorce; leave to file an answer NUNC PRO TUNC will not be granted.

Opinion delivered September 28, 1872, by

FINLETTER, J.—Rule to show cause why respondent should not be allowed to file an answer *nunc pro tunc*.

A libellant has no reason to complain who is required to comply with the rules regulating proceedings in divorce. He chooses his own time to begin and progresses by easy stages to a decree at his own convenience. Not so the respondent. Called upon to defend at the caprice of the libellant, the respondent may very easily be surprised into errors, or fall into neglect of the rules according to which the defence must be presented. Thus a perfectly good cause might come to ruin.

In no other class of cases is it so much the duty of the court to see that no injustice be done. It always lends a willing ear to excuses for non-compliance with the rules; and seldom refuses an application, the purpose of which is, to show that a divorce should not be decreed, come when it may.

Yet even this equity must be subject to some rules, otherwise the order and regularity, without which justice could not be judicially administered, would be entirely subverted. To entitle a party to relief who has failed to comply with the rules, he must show—

- 1st. That the application is made without unreasonable delay.
- 2d. That it is based upon surprise, haste, ignorance, or mistake.
- 3d. That unless relief be given, positive injury and injustice would be done.

4th. That no right has accrued to the other side which it would be inequitable or unjust to disturb.

Magill's Appeal, 9 P. F. S. 431.

The respondent in this case was served with subpoena on the twelfth day of April, and immediately retained counsel. On the first day of June he directed his counsel not to defend. On the twenty-second day of April the appearance of counsel was filed. A rule to answer in thirty days was entered, and proof of service of notice thereof was duly entered. On the twenty-eighth day of August proof of service of interrogatories, and time and place of taking depositions filed. September sixth cross interrogatories were filed by respondent's attorney. At the times and places of taking depositions the respondent and his counsel appeared and cross-examined the witnesses. On the ninth day of September, a rule for a decree of divorce was entered. On the seventh day of September, the respondent applied for the present rule. In his deposition he does not allege any facts which would bring him within the rules above set forth. He does not aver any reason for the wilful disregard of the rule to answer. Nor does it in any way appear that his cause has suffered by his refusal to answer; or that injustice would be done to him by not permitting him to file an answer at this time. To permit him to answer now would give him an opportunity to set aside the proceedings, which, so far as the libellant's case is concerned, are almost consummated; and that too at the expense of the libellant. If we allowed him to answer, how could we prevent him from demanding a trial by jury? and how could we refuse the demand when made? This would be a manifest interference with the rights of the libellant, which have accrued from his neglect, and would be inequitable.

Rule discharged.

J. Cooke Longstreth, Esq., for libellant.

Isaac S. Sharp, Esq., for respondent.

[Leg. Int., Vol. 29, p. 332.]

THOMAS BROMLEY vs. COMMERCIAL NATIONAL BANK OF PENNSYLVANIA.

Where the payee of a check on a bank, offers to take a smaller sum than the amount to the credit of the drawer, it is the duty of the bank to pay it to him, and indorse the amount paid on the check.

In equity. On bill and answer. Opinion delivered *October 12, 1872*, by **PEIRCE, J.**—The complainant is the holder of a check drawn to his order by "William P. Rayfield, agent," on the Commercial National Bank of Pennsylvania, for the sum of \$725, dated *October 8, 1866*.

In the month of *January, 1867*, the plaintiff indorsed the check and presented it at the bank for payment. The paying teller was about to pay it, when, on examination of the account of the drawer, he discovered that there was a balance of but \$229.92 to his credit in the bank. The plaintiff then demanded the payment of this balance to him on

account of the check, which was refused by the bank. The plaintiff then offered to deposit to the credit of the drawer a sufficient sum of money to make the check good if the bank would then pay the amount of said check. This was also refused by the bank. The plaintiff again made the said offer in 1869, and was again refused by the bank.

William P. Rayfield, the drawer, died about the time of the presentation of the check, but whether before or after does not appear; and his account was never made sufficient to pay said check; and the sum of \$229.92 has remained to his credit in the bank ever since. The balance in bank was afterwards claimed by Daniel K. Albright, as administrator of Rayfield, but the bank declined to pay him, because Rayfield's account was as agent.

The bank avers in its answer that it has always been ready and willing, and desirous to pay the balance in its hands to the proper party entitled to receive the same, and is still ready to pay the same according to the order of the court.

A check on a banker is similar to an inland bill of exchange. It passes by delivery when payable to the bearer; or if made payable to the order of a particular person and indorsed by him it seems to have the same quality of negotiability. It differs, however, from a bill of exchange in several particulars. It has no days of grace, and requires no acceptance distinct from prompt payment.

Chancellor Kent (3 Kent's Commentaries, n., 7th edition) says, it is an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought to remain until called for, and the drawer has no reason to complain of delay unless upon the intermediate failure of the banker. It is the tacit if not the express understanding between banks and their customers, that they shall have the right to draw for the whole or a part of the funds deposited with them. The cases treat a check on a banker as an equitable assignment or appropriation; and if the holder is a holder for value, as to whom the drawer cannot rightfully revoke the power which he holds coupled with an interest, why should not the banker upon distinct claim and notice, be held bound by the equity? Byles on Bills, 15, note.

It follows, as a consequence, that if such a check is an appropriation of the whole sum for which it calls, if so much is in the hands of the banker, it is an appropriation of any smaller sum which may be in his hands if there be not sufficient to pay the amount of the check. In such a case, if the holder of the check is willing to receive the smaller sum, as the bank is entitled to retain the check as evidence of payment and of the holder's right to receive the money, it should inorse the amount of its payment on the check, and issue to the holder a certificate of having received the check from him, and of having paid so much on account of it.

In this case the plaintiff offered to deposit to the credit of the drawer a sufficient sum of money to make the check good, if the bank would pay to him the amount of the check when so made good. This was all that the bank in reason could ask, and would have been a sufficient protection to it from any demand which the drawer could make for the money.

It seems that the death of the drawer of a check is a countermand of

the banker's authority to pay it. But that if the banker do pay the check before notice of the death, the payment is good. Byles on Bills, 17. In this case there is no statement of the time of the death of the drawer of the check, and as there is a presumption that a person is living who has been heard of within seven years, to rebut the presumption that the drawer was living at the time of the presentation of the check for payment, it should have been shown affirmatively that his death occurred before that event.

This case stands then as if the drawer of the check were living at the time of the demand of payment of it and there was then no countermand of the authority of the plaintiff to receive the money. And as the rights and duties of the parties were fixed at that time, it is not perceived how the subsequent death of the drawer of the check can affect the holder's right to receive the money. And as the presumption is that the holder of a check as against the drawer holds it for value, in the absence of proof of a want of consideration for it, even if payment of it were countermanded, the holder of it by virtue of the appropriation of the sum named in it to his use, would be entitled to receive it from the bank.

Let a decree be entered in favor of the plaintiff for the sum of two hundred and twenty-nine dollars and ninety-two cents, the amount admitted by the bank to be in its possession, and interest from the 18th of February, 1867, with costs.

Samuel Wakeling, Esq., for plaintiff.

Samuel Hood, Esq., for defendant.

[Leg. Int., Vol. 29, p. 397.]

BISHOP vs. OGDEN.

Plaintiff being holder of second mortgage that was not the *next* lien, is not entitled to an assignment of first mortgage upon payment of it in full.

In equity. Opinion delivered *December 7, 1872*, by

LUDLOW, J.—Notwithstanding the earnest appeal made to us by the plaintiff's counsel in this case, we are unable to discover what particular equity he has which will oblige us to make the order prayed for in this bill.

Undoubtedly under *Stockdale vs. Ullery*, 1 Wr. 486, and *Lyon's Appeal*, 11 P. F. S. 17, we may grant relief by restraining acts contrary to equity, but the relief sought must not work gross injustice to the party sued, and situated as is this defendant; the moment it appears that a wrong will be perpetrated, against the defendant, the equity of the plaintiff disappears.

Here Bishop owns a second mortgage, and he tenders payment in full of the first mortgage, upon which he has bought suit, *upon an assignment to him of that mortgage.*

This is all apparently equitable enough, but in the order of incumbrances, the plaintiff does not hold the *second* lien, for the defendant owns several judgments prior in lien to the second mortgage.

If we do not order an assignment of the first mortgage, on payment in full, the plaintiff gains nothing; if we do order that assignment to be made, we place the control of that mortgage in the power of a subsequent incumbrancer, who may at any time proceed to sell the property to the injury of any owner of the intermediate judgments.

The difference between this case and *Lyon's Appeal*, and the unreported cases cited at bar, is this, the defendant here holds a first mortgage upon the property, no capitalist will advance money or buy a judgment which is a lien upon a property covered by a first mortgage, unless he can control it; if we decide, as a principle, that a creditor who holds the third, fourth, or fifth lien, may compel an assignment of a first incumbrance by paying it, we destroy the value of securities bought upon the faith of a first incumbrance, and in favor of a party who has no greater equity than the first mortgagee. In *Lyon's Appeal*, and the other cases cited, the object to be obtained was an unjust one, so evidently so, that it hardly required an argument to prove it; the incumbrance was used for a purpose really illegal, and the cases were decided under peculiar circumstances; here there is but a conflict of interests, and the defendant is following his right of execution of his judgment. Let the defendant, in the *sci. fa.*, or some one for him, pay the first mortgage, and of course we will stay the sale, or let the plaintiff buy up the judgments intermediate between his second mortgage and the first mortgage, and then he will be in a position to maintain successfully his standing in a court of equity.

Bill dismissed with costs.

[Leg. Int., Vol. 29, p. 397.]

KERR vs. RODGERS.

The court will not extend the right to filing appeals from aldermen *nunc pro tunc*, beyond what has already been allowed.

Sur rule to show cause why defendant should not be allowed to file his appeal *nunc pro tunc*. Opinion delivered December 7, 1872, by

PAXSON, J.—The judgment was entered by the alderman on October 1. The appeal was taken October 3, and filed in the prothonotary's office on October 14. The return day was October 7. The transcript was filed one week too late. The defendant alleges as the reason of this, that the alderman delayed making out the transcript for several days. It appears, however, that he did not call at the alderman's office for the transcript until October 12, which was after the return day. The plaintiff did not take the alderman's deposition, and we have no light as to his version of the story. It does not appear that there was a demand for and a refusal by the alderman of the transcript. It is quite possible that as the appeal was taken on the second day after the judgment, the defendant thought he had the balance of the twenty days within which to file his transcript in the Common Pleas, overlooking the intervening return day.

The frequency of these applications admonishes us that we ought not to relax the rules of law applicable to such cases. Nothing short of an act of assembly can give a man an appeal when he has lost his right thereto by neglect. There is a class of cases, the number of which we do not feel disposed to increase, in which it has been held that a defendant may be allowed to file his appeal *nunc pro tunc*. Thus, where a defendant made an effort to appeal; had exercised due diligence, and had been prevented from taking his appeal by the absence from the county, or sickness of the alderman; or by a refusal of the latter to take the bail

or give the defendant a transcript, the latter has been allowed to enter his appeal after the twenty days have expired. *Read vs. Dickinson*, 2 Ash. 224; *Louderbach vs. Boys*, 1 Id. 380; *Snyder vs. Snyder*, 7 Philada. R. 391.

This case does not come within any of the exceptions noted, and the rule must be discharged.

[Leg. Int., Vol. 29, p. 397.]

NUTZ vs. BARTON.

Application to file appeal *nunc pro tunc* refused.

Sur rule to show cause why an appeal *nunc pro tunc* should not be allowed. Opinion delivered December 7, 1872, by

PAXSON, J.—The defendant has entirely failed to show any sufficient cause why this rule should be made absolute. We have nothing before us but his *ex parte* affidavit, in which he says, he “had no knowledge of the amount of the judgment against him until November 20, 1872, nor was it mentioned at the hearing.” If he did not know of the judgment it was his own fault, for all that appears. He was present at the hearing, and it was his duty to have at least made an effort to ascertain what judgment the alderman rendered. Suitors should understand that if they will not attend to their own business, the court cannot remedy their laches.

Rule discharged.

[Leg. Int., Vol. 29, p. 397.]

HAINES vs. HILLARY.

Defendant having been served and judgment recovered against him before an alderman during his absence from the city, in order to have a rehearing he must proceed according to section 7 of the act of March 20, 1810.

Opinion delivered December 7, 1872, by

PAXSON, J.—This was a rule to show cause why the defendant should not be allowed to enter his appeal *nunc pro tunc*.

The depositions establish the fact that the summons was served and the judgment recovered against the defendant at a time when he was some hundreds of miles from home.

The 7th section of the act of 20th of March, 1810 (Purd. 597, pl. 50), provides that “in case of judgment by default, the defendant, if he has any account to set-off against the plaintiff’s demand, shall be entitled to a rehearing before the justice within thirty days, on proof being made, either on oath or affirmation of the defendant, or other satisfactory evidence, that the defendant was absent when the process was served, and did not return home before the return day of such process, or that he was prevented by sickness of himself, or other unavoidable cause; and the justice shall have power to render judgment for the balance in favor of the plaintiff or defendant, as justice may require.”

If the defendant’s case comes within this section he should have pursued the remedy therein pointed out. However hard it may be to have a judgment rendered against him during his absence we cannot help him. Had there not been a legal service, the case might possibly have been different. But where a defendant is served according to law in a

suit before an alderman, his family or friends must make the best defence they can, or induce the alderman to postpone the hearing. We cannot allow an appeal where none is given by act of assembly.

In this case the depositions on behalf of the defendant contain some evidence of an effort on the part of his son to have the case continued, and of plaintiff's consent thereto. All this, however, was contradicted by the plaintiff. If it were not denied, it would not matter, as we have no power to grant this motion.

Rule discharged.

[Leg. Int., Vol. 29, p. 100.]

ASHTON vs. BAYARD *et al.*

A surety filed a bill in equity asking to restrain certain proceedings against him at law, the bill was ordered to be retained until verdict in the common law cases, and then, if necessary, plaintiff might come in.

In equity. Demurrer to bill of complaint. Opinion delivered *March* 23, 1872, by

PEIRCE, J.—The plaintiff filed his bill for discovery, account, and injunction under the following circumstances: Defendant, Coulter, executed an instrument of writing to defendant, Bayard, in the following words, viz.:

Due on demand, after sixty days, to C. P. Bayard, or order, one hundred shares of Schuylkill Navigation preferred stock.

STEPHEN COULTER.

Philada., October 25, 1864.

On the same day the plaintiff indorsed the said writing as follows, viz.:

I hereby become the security of S. Coulter for the fulfilment of the within obligation.

October 25, 1864.

S. K. ASHTON.

The defendant, Bayard, has commenced an action at law against plaintiff in the District Court for the city and county of Philadelphia, of September term, 1870, No. 1848, upon plaintiff's said indorsement, wherein he claims to recover from plaintiff the value of the said one hundred shares of Schuylkill Navigation preferred stock, together with interest and dividends accruing thereon since October 25, 1864, the said action is now at issue, and defendant, Bayard, threatens to prosecute the same to judgment and execution.

The defendant, Bayard, has also commenced an action at law against defendant, Coulter, in the District Court of the city and county of Philadelphia, of September term, 1870, No. 1847, wherein he has filed a copy of the due bill above set forth. In said action the defendant, Coulter, has filed an affidavit of defence, wherein he alleges that nothing is due from him to said Bayard upon the said due bill, but that they (the said Coulter and Bayard) had had large transactions in Schuylkill Navigation stock, and that no final account thereof had ever been rendered or made between them, and that on such final account and settlement, he (the said Coulter) believed that the said Bayard

would be found indebted to him in a sum far greater than the value of the said one hundred shares of Schuylkill Navigation stock. A copy of the said affidavit of defence is annexed to the bill, which complainant prays may be taken as a part of his bill. And plaintiff avers that since the filing of the said affidavit of defence by defendant, Coulter, the defendant, Bayard, has not filed any declaration, or taken any further steps to prosecute the said action against Coulter, but the same remains without being at issue, and, as it appears, without any intention on the part of said Bayard to further prosecute the same.

That plaintiff's only indebtedness or obligation to the said defendant, Bayard, for which the said action at law is brought, is as security upon the said due bill of defendant, Coulter, for the said one hundred shares of Schuylkill Navigation preferred stock; and that plaintiff is unable properly to defend the said action, because the facts in regard to the said transactions are wholly within the knowledge of the said Bayard and the said Coulter.

To this bill the defendant, Bayard, has demurred, and assigns the following causes of demurrer, viz.:

1st. Because the bill shows no cause for equitable relief.

2d. Because the plaintiff has a full and adequate remedy at law.

3d. Because the plaintiff does not allege that he, or the said Stephen Coulter, has any defence to the respondent's claim upon them.

4th. Because the undertaking of the plaintiff with this respondent is an original one; and the plaintiff has nothing to do with the accounts between the defendants.

5th. Because a bill of discovery lies in said suit in the common law court.

6th. Because the defendants are competent witnesses in said suit of this respondent against the plaintiff.

7th. Because the said Stephen Coulter is improperly joined as a defendant.

8th. Because the bill is wholly insufficient and informal.

The plaintiff, Ashton, stands in relation to the defendant, Coulter, as surety to a principal; and whatever *ex equo et bono* would relieve Coulter from the claim of Bayard, will avail as a defence to Ashton. If Coulter could maintain a bill against Bayard, for discovery and account, under the facts stated in this bill, so can Ashton. Such bills are constantly maintained in equity on behalf of sureties for discovery, account, marshalling of securities, etc. Story Equity Jurisprudence, 35, 496, 633, note.

The plaintiff sets forth in his bill a defence, which, if established, is a complete answer to Bayard's claim, and which requires that an account should be taken of the transactions between Coulter and Bayard, to make the defence available. To take this account, it is necessary that Coulter should be a party to the bill. This disposes of the first, third, fourth, and seventh causes of demurrer.

It is true that a bill of discovery lies in the suit in the common law court, and in that suit that all parties are competent witnesses; but discovery alone without account, will not give the plaintiff the full benefit of his defence; and that court has no equitable jurisdiction of matters of account. This disposes of the fifth and sixth causes of demurrer.

The eighth is of too general a character to require notice; and the bill does not appear to be insufficient and informal.

The second cause of demurrer is, "Because the plaintiff has a full and adequate remedy at law."

In looking at the bill, this would seem to be a good cause of demurrer if thereby is meant that the undertaking of the plaintiff, Ashton, is without consideration. Upon the face of the contract none is expressed; and none appears to be implied from the character of the transaction. It seems, therefore, to be *nudum pactum*. And of this defence the plaintiff may avail himself at law. But it is not necessary in a contract of this character, that the consideration should be expressed in writing, or be clearly inferrible from the character of the transaction itself; it may be proved by other evidence. *Shively vs. Black*, 9 Wright, 345.

The plaintiff may also avail himself of the defence at law, that Bayard has not pursued the principal debtor, Coulter, to judgment and execution; but this defence would not avail if it should be proved that Coulter was insolvent.

Under these circumstances, it will be necessary to retain this bill; permit the parties to proceed at law as far as the verdict of a jury; and then, if necessary, permit the plaintiff to come in and seek the remedy which he prays by his bill.

It is ordered that the bill be so retained.

David W. Sellers, Esq., for plaintiff.

George Junkin, Esq., for defendants.

[Leg. Int., Vol. 29, p. 108.]

McMURTRIE vs. PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES, ETC.

1. Where trust funds are invested in securities not recognized as legal investments, and not specifically bequeathed or given, the trustee has *prima facie* an implied power to change the investment, and a corporation permitting a proper transfer of such securities, upon a sale thereof by the trustee, is not liable for a breach of trust by him.
2. The trustee cannot delegate his discretion either to another, or to a co-trustee. And a corporation permitting a transfer of its stock, held as a trust investment, by one of two trustees transferring the same as trustee and as attorney in fact of a non-resident trustee, under a general power of attorney by which the whole management of the trust estate is delegated, is responsible for the consequences of a breach of trust by such trustee.

In equity. Opinion delivered March 30, 1872, by

PAXSON, J.—This case came up upon bill and answer. It involves two important questions, viz.: 1st. Had the trustees under the will of Bohl Bohlen, deceased, any power under said will, to transfer the stock? and 2d. Was there a valid transfer of the stock referred to, under the power of attorney?

The operative words of said will, creating the trust, its powers and duties, are: "I give, devise, and bequeath" . . . "the rest, residue, reversion and remainder of my estate, real, personal and mixed, whatsoever and wheresoever, . . . in trust to pay the rents, interest and income thereof, to my daughter, J. C. M. Halbach, wife of A. Halbach, during all the term of her natural life, for her sole and separate use, without the control or interference of her husband, or liability for his debts or engagements, or at the option of my said daughter, to permit and suffer

her to take and receive the said rents, interests and income herself, for her sole and separate use, and her receipt alone, notwithstanding her coverture, to be a good and valid discharge for any payment made to her," and upon the decease of his said daughter, over in remainder.

By a prior clause in his will, the testator had directed his executors to sell his real estate, and the proceeds thereof, and other funds derived from his estate, to invest in real security, the public funds, bank or other stocks, and in real estate.

The will of the testator was admitted to probate in 1837. In the first clause thereof, he named John Bohlen and Edward Hagedorn, his executors. Afterwards, in the clauses creating the trusts for his two married daughters, he devises two-tenths of the residuary estate to them in trust for each daughter. They were, therefore, both executors and trustees.

Among other things held by the testator, and which it is charged his executors elected to retain unconverted as an investment, and hold as trustees, were certain shares of the capital stock of the Pennsylvania Company for Insurance on Lives and Granting Annuities, etc., defendants, which said shares were divided between the trust, as follows: to the trust for Johanna C. M. Halbach, 14 shares, and to the trust of Henrietta W. Halbach, 14 shares.

In the year 1850, at the death of John Bohlen, the surviving trustee, the Orphans' Court appointed John C. Lang and Charles Vezin, trustees under the said will for the trusts above stated.

In the year 1854, the said court appointed Charles Vezin, the younger, Frederick Lorenz and Benjamin Gerhard, trustees, in the place of said Charles Vezin, deceased, and John C. Lang, and the said shares were transferred to them as trustees, the trust being declared in the certificate and on the books of the company to be, as respects fourteen of said shares in trust for J. M. C. Halbach, and as respects fourteen, in trust for H. C. Halbach.

In December, 1864, and January, 1865, by two several decrees of said court, the plaintiff was appointed trustee of said trusts, in place of Benjamin Gerhard, who was then deceased.

It does not appear that any notice of this last appointment was given to the defendants prior to the transfer of the stock, complained of in the bill.

Frederick Lorenz, one of said trustees, has been for several years past residing in Europe. On the 21st of September, 1870, the corporation defendants permitted the said Charles Vezin, as trustee, and as attorney in fact for the said Lorenz, to transfer the said shares to another person, who now holds the certificates therefor. Vezin converted the proceeds to his own use, and absconded.

The bill seeks to charge the defendants with the value of the stock, which they allowed to be transferred as above stated. The plaintiff alleges:

1. That the defendants are liable for permitting the transfer, because they had express notice of the trust, and the trustees had themselves no power to transfer; and

2. That the power of attorney from Lorenz to Charles Lorenz and Charles Vezin, Jr., was void on its face, because a delegation of discretion; and that the defendants are, therefore, liable for allowing a trans-

fer to be made without other evidence of the consent of Lorenz, whose name appeared as trustee.

In regard to the first point, it would seem that the defendants had express notice of the trust, for the reason that the fact of the trust appeared in the certificates, and in the transfer books, and is admitted by paragraph 1 of the answer. This was, at least, sufficient to put the defendants upon inquiry, and they are bound by whatever that inquiry would have disclosed. It was held in *Bayard vs. The Bank*, 2 P. F. Smith, 235, that "corporations are trustees to a certain extent for stockholders, that is for the protection of individual interests, . . . they are alike trustees of the property and of the title of each owner. They have in their keeping, the primary evidence of title, and they are justly held to proper diligence and care in its preservation. From this, it results, that they may rightfully demand evidence of authority to make a transfer before they permit it to be made. Their own safety requires that they be satisfied of the right of the person proposing to make a transfer, to do what he proposes. Generally sufficient evidence of such right is found in the possession of legal title to the stock. Yet it is well settled that it is not in all cases sufficient, notwithstanding that the true equitable ownership may be in some other than the holder of the legal right, and a transfer may be a gross wrong to such an equitable owner. To that wrong, the corporation or keepers of the register make themselves parties, if with knowledge that there is no equitable right to transfer, they permit it to be done."

It may therefore, safely be assumed, that where stock stands upon the books of a corporation in the name of a trustee, the said corporation is bound to inquire as to the authority of the trustee to transfer said stock, before they permit such transfer to be made. This rule does not apply, however, to the case of executors and administrators transferring stock standing in the name of a decedent, for the reason that the law casts upon them the legal ownership of the personal property of such decedent. It is their duty to pay debts and make distribution amongst heirs or legatees. To do so, they must convert the personalty into cash, and a transfer of stock therefore, would be in due course of administration. It would be unreasonable to hold that a corporation in such case, should be held to inquire whether, in point of fact, the particular stock were needed for the payment of debts or of legacies. The rule that a certificate of letters testamentary or of administration is generally sufficient to justify the transfer of stock is recognized in *Bayard vs. The Bank*, and several cases cited by Mr. Justice Strong, in his opinion. Yet there are authorities which hold that in the case of an executor, the party permitting the transfer is bound to see that the former has authority under the will to make such transfer. *Lowry vs. The Bank*, American Law Journal, N. S. vol. 3, p. 111, and cited in *Bayard vs. The Bank*.

A trustee stands upon a different footing from an executor or administrator in regard to the transfer of stock. Administration is no part of his duties. His office is to hold and safely keep the trust funds in accordance with the terms of the will or other instrument creating the trust. Sometimes it is to pay income to the parties entitled thereto; or to accumulate the same during a stated period. If he transfer securities it must be in pursuance of an express authority contained in the

trust itself, or by virtue of an authority implied from the nature of said trust, or the character of the securities in his hands. In this case, the plaintiff contends that there was neither an express nor an implied power of sale.

The will of Bohl Bohlen, deceased, after creating the aforesaid and other trusts, contains the following clause, viz.:

"*And provided also*, and it is my mind and will, and I do hereby direct, authorize and empower my said executors and the survivor of them, for the better settlement and distribution of my estate, to sell and dispose of all or any part of my real estate, and to convey the same to the purchaser or purchasers thereof, his, her or their heirs and assigns forever; and the moneys arising from such sale, together with any moneys that may come to their hands from my personal estate, to be by them invested in the purchase of real estate, in the public funds or placed out at interest on good real security, or in bank or other stocks, or part and parts in either, as they shall see proper, for the purposes of this my will, and in such way and manner as they or the survivor shall deem most advisable; and in order that no difficulty may arise in the sale of my real estate, if one of my executors should be absent from the United States, I do hereby declare that the conveyance made by the other executor shall be as good and available in law as though both executors had made such conveyance."

Here there is express power given to his executors to sell his real estate; and, in order that there might be no difficulty in making such sales, he authorizes one executor to make conveyances thereof in case of the absence of the other executor in Europe. There is no power given to them in terms, to transfer stocks. That the executors had such power by virtue of their office may be conceded. But they did not sell the stock referred to. They elected to retain it unconverted, and it passed into and formed a part of the trust estate.

As before observed, the original executors were also trustees. They acted in a double capacity. The mere fact that the two offices are united in the same persons, does not change their duties or responsibilities. John Bohlen and Edward Hagedorn as trustees under the will of Bohl Bohlen, are to be held to precisely the same rules as if they had not also been named in said will as executors. Clearly their successors in this trust who are trustees alone, and who have never been in any way concerned in the administration of the estate, can possess and exercise only such power as they derive from the will, or is incident to the office of trustee in the management of the trust estate.

The executors not having converted this stock, and it having passed into the hands of the trustees as a part of the trust estate, there is no express authority in the will for them to transfer it. This brings us to the question whether there is any implied power in a trustee to sell securities in his hands belonging to the trust estate.

In considering this point we must not lose sight of the fact that this question does not arise between the trustees making the transfer and their *cestuis que trustent*, but between the latter and the corporation which allowed the transfer to be made. While the latter may not be regarded strictly as an innocent party, still it must be apparent that the question whether said corporation is to be mulcted to the amount of the

stock rests upon a very different principle from the question whether as between the trustees and the *cestuis que trustent*, the transfer was proper.

We must also dismiss those cases in which there was a specific devise or bequest. Among them may be mentioned *Lowry vs. The Commercial and Farmers' Bank*, before cited, and which was decided by Chief Justice Taney in 1848. There stock stood in the name of an executor. The bank (defendant) allowed him to transfer it and receive the proceeds. The stock was specifically bequeathed to the executor *in trust* to pay over the dividends, etc., and the transfer was made eight years after the testator's death. The court held that no implied power to sell existed, and the bank was held liable, because after eight years the payment of debts was to be presumed. In the face of a specific bequest of the stock, no implied power except for the payment of debts could exist, and this was negatived by the lapse of time since the testator's death.

Hertell vs. Bogart, 9 Paige, 57, merely decides that inasmuch as the executors were trustees of the mortgage, an assignment thereof by one of them was insufficient. Had they both executed the assignment it would have passed the title to the mortgage. This is a concession of their *power* to make sale of the mortgage.

In *Bayard vs. The Bank*, cited by plaintiff, the only point decided by the court was, that "a transfer agent before permitting a transfer of stock, appearing on the face of the certificate to be held in trust, has a right—especially if the *cestui que trust* is named—to require the exhibition of the authority to transfer beyond the certificate." It is in no sense an authority that there is no such thing as an implied power of sale in a trustee to sell stocks or other securities belonging to a trust estate.

Had the corporation, defendants, examined the will of Bohl Bohlen prior to allowing this transfer, what would they have found? Certainly no specific bequest of this stock, by which the trustees were directed to hold it, and pay over the dividends, etc. But on the contrary, they would have ascertained the fact that this particular stock passed to these trustees as a part of the testator's residuary estate, to be held under certain trusts, and without any restrictions upon transfers.

There is the additional fact that this stock was not a legal investment. The question as to how far a trustee is bound to convert illegal into legal investments, is a very nice one, and which it is not necessary for us now to decide. It is said in *Hill on Trustees*, *379: "Where the trust property is already invested in personal or other securities, which would not be sanctioned by the court, it frequently becomes a question of no little difficulty to determine how far it is the duty of trustees to call in such securities, and lay out the proceeds in some proper investment." And again, in same book, *380, "If, however, the author of the trust, in general terms, vests his whole estate in trustees, either by deed or will, without any specific mention of the securities of which it then consists, and there be nothing from which it may be inferred that the trusts were intended to apply to the property in its actual state, it would be a very hazardous course for the trustees to suffer any part of the estate unnecessarily to remain outstanding on improper security. It would certainly be no valid reason for so doing, that the creator of the trust himself considered the existing securities to be sufficient investments." The same

authority, *381, says, "In some cases, the trustees will be charged with interest, as well as the capital which has been lost by not calling in the improper securities."

If a failure to change an illegal into a legal investment may make a trustee responsible for such omission, it necessarily follows that he must have an implied power of transfer, though no express power be contained in the instrument creating the trust. We prefer to limit this decision to the facts of this case, and we do not express any opinion as to the right of a trustee to transfer stocks recognized as legal investments, without express authority.

Whether this transfer was judicious is no part of this case. It is a question of power to make the transfer. If it exists, the defendants are not to be held responsible for its disastrous exercise.

The remaining question for our determination is as to the validity of the sale under the power of attorney. It is elementary law that co-trustees must join in a transfer of stock. In this case the fact is admitted that plaintiff's appointment as trustee was not communicated to the defendants, and it is not urged that his non-joinder affects the validity of the transfer. But it is alleged that the power of attorney from Mr. Lorenz, the trustee, who was in Europe, was a delegation of discretion, and therefore void. The authorities are clear that there can be no valid delegation of a discretion. *Bulteel vs. Abinger*, 6 Jurist, 412, is a leading case upon this subject. One of the trustees declined to take any part in a sale of the trust property, authorizing his cotrustee to sell the estate, under their powers. A sale was effected by this cotrustee, accordingly, and on a bill for specific performance brought by the vendee, it was held, 1st. That the fact of the trustees being also executors did not give each trustee, *qua trustee*, authority to deal exclusively with the property. And 2d. That Lord Abinger could not lawfully delegate to his cotrustees an authority to sell the estate to his son without reserving to himself a veto on the contract. In *Hill on Trustees*, *474, it is held that a trustee is not justified in delegating the power of sale to a stranger, nor even to a cotrustee. In *Hawley vs. James*, 5 Paige, 487, the principle is thus stated: "A trustee who has only a delegated discretionary power, cannot give a general authority to another to execute the same, unless he is specially authorized to do so by the deed or will creating such power." And in *Pearson vs. Jamison*, 1 McLean, C. C. Rep., p. 197: "Where an executor by the will, is empowered to sell real estate, in the best mode in his judgment for the interest of the estate, he cannot delegate the power to another." In *Berger vs. Duff*, 4 Johns. Ch. R. 368, the case was this: The testator authorized his executors, B and C, to sell certain lots of land, if, under the circumstances of the times, they should deem it prudent; and C having gone abroad, sent a power of attorney to B, his coexecutor, to sell the land, on such terms as he should deem expedient. *Held*, that an agreement for the sale, entered into by B, for himself and C, was not valid, and a bill filed for a specific performance of it was accordingly dismissed. The chancellor, in deciding the case, says: "The agreement to sell was not valid, being made by one executor, without the personal assent and act of the other. The power was not capable of transmission or delegation from one executor to the other, and the rule of law and equity on this point is perfectly well settled," citing *Comb's*

Case, 9 Co. 75; *Ingrum vs. Ingram*, 2 Atk. 88; Sir Thomas Clarke, in *Alexander vs. Alexander*, 2 Ves. Sr. 643; Lord Hardwicke, in *Attorney-General vs. Scott*, 1 Ves. Sr. 417; Lord Redesdale, in 2 Sch. & Lef. 330; *Hawkins vs. Kemp*, 3 East, 410; and Sug. on Powers (2d ed.), 167.

The defendants allege, however, that there was no delegation of discretion in the power of attorney; that the acts to be performed by the attorney were merely ministerial. If the facts be so, the case would be free from difficulty. A trustee may delegate a mere ministerial duty, such as signing his name to a transfer of stock, or to a deed; and if this were all this power of attorney authorized, the defendants would be right in their construction of it. But it was a general power to sell stocks, embracing everything in the estate, with authority "to call in, sell or change any or all of the said stocks or loans," etc., with a power of substitution; and it was without any limit as to price, or reference to the time, place, or manner of sale. Nor did the principal reserve any veto or check upon the act of his agent. The latter was to exercise all the discretion which was by law vested in the former. Whether the price was sufficient, or the sale itself, at the particular time, and in the then condition of the stock market, was judicious, were questions which the agent was empowered to decide without any consultation with his principal. In this respect we think the power of attorney was invalid. If after making the sale, the attorney had reported the same to his principal, and the latter had ratified it, *thus exercising his discretion*, I have no doubt the transfer under the power would have been good. And herein the defendants were remiss. With such a general power, delegating discretion, they should have required some evidence of the ratification of the sale by the principal. Any assent, the production of a letter from him, would have been sufficient. But in the absence of any such ratification on his part, we are of opinion that the defendants had no right to allow this transfer; and that they are responsible for the loss of this stock.

Nor do we think it helps the defendants that the trustee, Lorenz, has been absent in Europe for seven years. Such absence, although rendering him liable to removal, did not *per se* oust him from the trust. The fact that the defendants rely upon his power of attorney as such trustee, for their protection, is a sufficient answer to this point.

The decree in this case must be for the plaintiff. It may be prepared and submitted in accordance with the rules of court.

George Biddle and George W. Biddle, Esqs., for plaintiff.

John G. Johnson, Esq., for defendants.

[Leg. Int., Vol. 29, p. 108.]

COMMONWEALTH *ex rel.* CITY SEWAGE CO. *vs.* SAMUEL P. HANCOCK,
CITY CONTROLLER.

The controller can, under certain circumstances, refuse to countersign a bill or warrant, but this is not an absolute and unqualified power. The return to a mandamus must be "certain to a certain intent in general."

Opinion delivered March 30, 1872, by

ALLISON, P. J.—The question before us is the sufficiency of the amended return of the city controller, showing cause against the command of the alternative mandamus.

The first return was upon special demurrer filed by the relator, decided to be insufficient, because it was vague, indefinite, and uncertain in its statements, and was therefore "not certain to a certain intent in general," which in the case of the *Commonwealth ex rel. Thomas vs. Commissioner of Allegheny Co.*, 8 Casey, p. 218, was held to be the rule in force in Pennsylvania; and, as expounded in that case, is declared to be that which, upon a fair and reasonable construction, may be called certain without recurring to possible facts which do not appear. This definition of the rule we are bound to adopt, in so far as we are able to gather from it what is its true and accurate meaning; we think, however, it will be conceded, that it is not remarkable for its perspicuity, or that it conveys to the mind of the reader a clear and definite understanding of the rule sought to be interpreted. This much, however, is plainly stated,—it is intended as a modification of the common law doctrine, which required a return to a mandamus to be set forth with as much strictness as is necessary in pleading an estoppel; or as is requisite in an indictment, or in a return to a writ of *habeas corpus*. But with all its modification, it is still demanded that every allegation of a return must be direct, and be stated in the most unqualified manner; not inferentially or argumentatively, but with certainty and plainness: Tapping, 354-7.

The first averment of the controller in the original return is, that the evidence, so far as this department can ascertain, is that the contract was hardly attempted to be complied with by the City Sewage Utilization Company in January, except the part of taking up ashes for a part of the time, and in portions of the city only. The second most material allegation is, that the company did not fulfil the obligations of their contract in January, 1872, and that they did not faithfully perform during the month of January that which, by the terms of their contract, they were required to perform. There is in all this, no statement of the nature and character of the information or evidence referred to; nor is there a distinct averment that any evidence had been ascertained by the controller; nor is it stated in the second paragraph of the return, in what respect, or to what extent, the company failed to fulfil the obligations of their contract.

These allegations, in our judgment, are wanting in directness; are not unqualified statements of fact, and are little more than opinions and inferences of the controller, with no disclosure of the facts upon which they are based. The demurrers to these portions of the return were sustained, with leave to the controller to amend his answer. This he has done, and to this amended return the relators have again demurred.

We have now a repetition of the general averment, that the sewage company did not comply with the terms and spirit of their contract during the month of January, for which the warrant was drawn; to which is added the particular statement of a failure to keep the streets clean by brooming and sweeping; that they did not clean the market-houses in that month; that they in part only complied with their contract to remove once in each week ashes placed on the sidewalk; that prior to the 15th of January no attempt was made by the company to remove the ashes in any considerable quantities; and that during the rest of the month they were removed in certain localities only, and even

there very irregularly. These averments are made on the personal observation of the controller as to six of the wards of the city, and upon statements and information made to him by six of the inspectors appointed by the board of health, whose information is stated to be official, whose names are given, and the districts over which they have charge described, showing an examination of a considerable portion of the city by these inspectors for the month of January.

These statements we regard as coming up to the rule, being "certain to a certain intent in general;" and that upon a fair and reasonable construction they may be called certain, without recurring to possible facts which do not appear. Keeping in mind this luminous exposition of the standard of directness and certainty, which our Supreme Court have adopted, following, as they did, in the lead of the Court of King's Bench in England, that without calling to our aid "possible facts which do not appear," there is no obscurity or want of directness in the statement that the streets were not swept or scraped at all; that the market-houses were not cleaned; that for the first half of the month little or no ashes were taken up, and for the remaining part of it this duty was only partially and irregularly performed in certain localities; that there was no general and substantial compliance with the contract in this respect during any part of the month of January.

Looking to the contract, we find that all of these things the relators undertook and promised to do, and in consideration of their performing their stipulations of the contract, the city of Philadelphia, through the board of health, agreed to pay to them the sum of \$144,408.63 for the year 1872, in equal monthly instalments; for which the board of health are required to draw their warrants upon the treasury of the city.

It is a self-evident conclusion from these facts that no warrant could properly be drawn for the first month's payment, unless the work, according to the true intent and meaning of the contract, had been done in the month of January; but the board of health on the 27th of February directed a warrant to be drawn in favor of the relators for \$12,035.05, "in payment for street cleaning, etc., for the month of January, 1872, as per contract."

This warrant the controller refused to countersign for the reasons already referred to, and to this refusal the relators have taken exception, claiming that the action of the board of health is conclusive upon the controller—that he cannot go behind the warrant and inquire into the question of the consideration, or revise the action of those who directed it to issue. But in this assumption we do not agree with the relators. There is nothing in the acts of assembly providing for and directing the board of health to enter into a contract with the sewage company, so far as we have been able to discover, which take the warrants issued under the contract out of the operation of the laws and ordinances relating to the powers and duties of the controller. The board of health stands in this matter as and for a department of the city, charged with the oversight of the cleansing of the streets. The presumption in the first instance is, that the warrants drawn by its authority are properly drawn; but the controller is charged by the act of May 13, 1856, P. L. 573, with the duty of examining all bills and warrants presented to him for his approval, and to refuse to countersign the same, if no appropria-

tion has been made for payment ; or, if made, when the same has become exhausted ; or if, from any other cause, he cannot give his approval, it shall be his duty to inform the department, etc.

This is not an absolute and unqualified power, which the law for wise purposes places in the hands of the controller, and so we decided in *Walton vs. Lyndall*, 2 Brewster, 425. The controller may not from mere caprice, or from a neglect or refusal to ascertain whether cause exists against countersigning a bill or warrant, or from dislike or hatred to the person presenting the same to him for approval, or for any insufficient reason, refuse his official sanction to a claim when presented in proper form for countersigning. The discretion which is given to him must be founded on a reasonable and proper cause ; the words of the statute, "if from any other cause," shows that cause must exist to justify refusal, and when called upon by alternative mandamus to obey the command of the writ, or to justify his refusal, he must make it appear to the court that proper legal cause does actually exist against countersigning the bill or warrant. The claim which was set up for the controller in *Walton vs. Lyndall*, of absolute right of approval or refusal, and which was then denied to him, was properly decided, and we repeat here, that the discretion which he is required to exercise is a sound, honest, and legal discretion. If this is wanting upon his own showing, then his refusal is not grounded upon cause, which must be interpreted to be a sufficient cause. Where this is not made to appear his action will be controlled. Nor is the reason put forth in the dissenting opinion in *Walton vs. Lyndall*, that this is in effect the collection of a debt, well assigned. It has nothing to do with the compulsory collection of a debt ; it is simply a question whether the evidence of a claim shall have appended to it one of the marks or designations for which the law provides, and which is required in all cases before the treasurer can be called on for payment ; just as the mayor may be compelled to affix the corporate seal of the city to a bond of the city, or to attest the same by his signature in cases where this formality is required. The countersigning of a bill or warrant does not necessarily advance the payment of the claim a hair's breadth. If the treasurer choose to refuse payment after it is countersigned, it must still go to suit, and defence to the claim is not precluded by the signature of the controller. It is, therefore, not even an attempt to collect a debt by mandamus, but the enforcement of a right as to the stamp or countersign, which the law authorizes the creditor to have affixed to his claim, unless proper cause can be found to excuse the refusal of the controller.

It is an essential preliminary, before legal demand for payment can be made on the treasurer. The advantage and value of it are obvious, even when payment is not at the time desired ; like a bond properly executed, it will pass by assignment from hand, it at once becomes saleable in the market, or it may be kept for an investment drawing interest. There is no other mode of attaching to a warrant these incidents ; and, as there is no other legal remedy for a refusal to give to a claimant the advantages to which by law and ordinances of the city he is entitled, mandamus is his proper remedy.

When this case was first before us upon the original return, we expressed the opinion that the contract was to be regarded as an entirety,

and that it ought to have given to it a reasonable and practical construction, and not such an interpretation as would render its execution impossible. The letter of the agreement calls for certain work to be performed once in each week; but inasmuch as there are physical and climatic causes which interfere with the literal compliance with all of the stipulations of the contract, that which is impossible is not to be exacted. Streets that are covered with ice and snow are not expected to be swept and scraped, and all that the relators are required to do in this respect is to scrape and broom the highways in each week when it is possible to do so, but they are to be held to the full measure of such possibilities within the requirements of the agreement. This we think is no more than reasonable, regarding the contract as an annual contract, so much for the year, payable in monthly instalments; and if in the winter months the cost to the company of keeping the streets clean and removing the ashes and offal is less than the sum to be paid to them, it must not be forgotten that in the summer months the expenditure would probably be largely in excess of the instalments to which they would be then entitled. In addition to this is the further consideration that the cost to the company, or to the contractors employed by them to perform the work of investment of capital for stock, wagons, and machinery, is a charge to which they are subject, and from which they cannot free themselves during the inclement season of the year.

We have referred to some of the questions which grow out of the case, which might perhaps, with propriety, have been passed by, at this stage of the hearing but for the reason that the former decision was an oral one, and there is therefore no statement of the reasons on which our judgment was founded, we have thought it to be proper to allude to them now. To this we desire to add that we think it will be a just cause of regret if the hope which was entertained of securing for the city all that was expected from, and promised by the relators, shall be disappointed. Clean streets and highways are not only desirable, they are a necessity for Philadelphia, and a fair trial ought to be made of this agency before it is abandoned. Unreasonable and factious opposition ought to find no favor with any branch of the city government; for, if properly carried out, we shall be greatly the gainers in health and comfort, and the saving to the city, in actual expenditure of money, will not be less than half a million of dollars.

Demurrer overruled.

S. E. Megarge, William Rotch Wister and John C. Bullitt, Esqs., for plaintiff.

George D. Budd, William J. McElroy, Esqs., and C. H. T. Collis, city solicitor, for defendant.

[Leg. Int., Vol. 29, p. 188.]

STRUTHERS *et al.* vs. BICKLEY *et al.*

A lease from the city of a wharf and landing, does not give the tenant a right to store street dirt on its whole length, the wharf being part of the street.

In equity. Motion to continue special injunction. Opinion delivered June 8, 1872, by

FINLETTER, J.—On the first of July, 1869, the city of Philadelphia

leased to the defendant Bickley "the premises situate in the eighth ward of the city of Philadelphia, known as Walnut street wharf and landing, in the river Schuylkill, for the term of three years."

Under this lease he now exclusively occupies one hundred and sixty-five feet from the head of the wharf, by storing street dirt thereon. The pile covers the whole width of the wharf and street, and extends from about five feet from the head of the wharf one hundred and sixty feet eastward. At its west end it is from fifteen to twenty feet high, sloping downwards its whole length.

The plaintiffs are owners and lessees of land and wharves at and near the end of Walnut street, and contiguous to the premises occupied by Bickley. They allege by their bill and affidavits that the pile of dirt emits noxious and unhealthy odors and dust, and completely prevents access from their premises to and upon said Walnut street, and thereby they are specially injured. And that it is a public nuisance, affecting the health, comfort and convenience of the public.

It does not satisfactorily appear that the odors and dust from the pile of dirt are of such a character as imperatively to require interference by special injunction.

The obstruction of a street is *per se* a public nuisance. The questions which arise in this case are, 1st. Is the *locus in quo* part of a street? And, 2dly, if it be, has the defendant, Bickley, shown a right to its exclusive use?

The premises occupied by Bickley were originally between high and low water mark. The general doctrine in relation to such places is, that they are retained as eminent domain for the use of all citizens. 6 Wright, 219. It is contended, however, that the act of 1805, gave to the corporate authorities of the city, ownership of the ends of the streets; from which the right to lease to the exclusion of the public arises.

The streets of the city being laid out in parallels, or nearly so, there were necessarily large spaces of land bordering the rivers Delaware and Schuylkill, which were not included in the plan of streets running north and south. These spaces were intersected with such streets only as the exigencies of the owners of the land and the public from time to time required.

The extension of the streets running east and west to and into the rivers became at once a necessity. It was the only means by which the public could legally have access for any purpose to these great natural highways.

The original charter from William Penn provides, "that the streets of the said city shall forever continue as they are now laid out and regulated, and that the ends of each street extending into the river Delaware shall be and continue free for the use and service of the said city and the inhabitants thereof, who may improve the same for the best advantage of the city, and build wharves so far out into the river there as the mayor and aldermen and common council shall deem meet."

During the same year similar rights were conferred as to the ends of the streets extending to the river Schuylkill. It will be seen from this that the ends of the streets were "*to be and continue free for the use and service of the said city and the inhabitants thereof.*"

The sixth section of the act of 1805, after reciting these grants says, "as such a public benefit will now be highly useful to the inhabitants of said city and to other citizens of the Commonwealth, therefore be it resolved by the authority aforesaid, that the corporation of the said city shall be invested with all and singular the powers and authorities, jurisdictions, rights and immunities, in and to and over the ends of each and every public street or alley which extends to or into the river Schuylkill, as fully and to all intents and purposes, and to the like uses as by the said charter or any laws of this Commonwealth, is or are granted respecting the ends of the several streets which extend to or into the river Delaware."

This act recognized the usefulness of the ends of the streets "to the inhabitants of said city and other citizens of the Commonwealth," and for that reason vested in the corporation jurisdiction over them. This jurisdiction was, however, to be and remain subservient to the "purposes and to the like uses as had been confirmed to the citizens by the charter and acts of assembly."

These purposes and uses were the free and unrestricted use of the ends of the streets as highways. The corporation became thereby the mere custodians of these portions of our streets, for the free use thereof by the public. It could do nothing with them which would in anywise interfere with the rights of the public; and as a necessary consequence could not confer upon any one a right to their exclusive use. If it has the authority to lease them for any purpose which is not apparent, certainly it must be exercised in such a manner as not to interfere with the free enjoyment of the public rights.

If this view of the subject be incorrect, there is another, which is perhaps conclusive against the claim of Bickley. The plans of the city, dated 1817, 1832, 1851 and 1868, approved by councils and recorded in the survey department, represent the streets as extending to the river Schuylkill, "and to the ends of the wharves as carried out, and where the footways are marked on the plans they are carried out to the river and ends of the wharves." These plans and ordinances dedicated the ends of the streets to public use. If this be not so, still they are at least the most emphatic declarations of the corporate authorities that the streets extend to the ends of the wharves. The defendant Bickley, in 1869, when he received the lease, is presumed to have knowledge of the plans and ordinances, and is bound by every conclusion that may be properly drawn from them. The lease, therefore, must be taken to have been entered into by both lessor and lessee with the knowledge and upon the condition that Walnut street extended to the end of the wharf, and with all the rights of the whole community in, to and upon it, as a portion of the highway reserved. The city authorities in 1869 held this street and wharf and landing subject to these reserved rights. Even if they had the power to exclude the public from its use, in and by a lease, it could be done only by fit words of exclusion. No such words are in the lease to Bickley, and he holds, therefore, only as the lessors professed to hold, subject to all the rights of all the citizens in a public highway.

The defendant, Bickley, claims to have used the premises for storage for upwards of twenty-one years, and therefrom asserts a prescriptive right to continue so to use it. It is well settled that no such right can

arise against the public. If it could, whatever right he may have had therein he surrendered and abandoned by accepting the lease from the city in 1869. His present rights are based solely upon that instrument.

If the city have the right to make the lease the lessee has no right to use the premises for any other purpose than that indicated by the nature of the thing leased. If a hotel be let as a hotel the lessee has no right to make a blacksmith-shop of it. If a church be let as a church the lessee cannot convert it into a distillery. If a wharf or landing, or street, be let as such, the lessee cannot destroy their nature and character by converting them into dwelling-houses or storehouses, or places of storage alone. The things leased to Bickley were "Walnut street wharf and landing in the river Schuylkill." He now uses them as a storage for street dirt, and asserts the right so to use them during his whole term. The wharf and landing are thus destroyed. Surely his lease gives him no right to do this.

It will be observed that "the wharf and landing" which were demised, are not set out by metes and bounds. If it be conceded that this was a proper letting, and that by necessary implication it carried with it a right to use a portion of the highway, still it would be only so much thereof as was reasonably necessary for the use of the wharf and landing. It will scarcely be contended that one hundred and sixty-five feet of a public highway in the business heart of the city is not an unreasonable allowance for the enjoyment of a wharf and landing for which the city receives a rental of \$210. With the most liberal interpretation of the lease in this respect in his favor he has no right to use as much of Walnut street as he is using and as he claims to continue to use.

By the ordinance of October 29, 1866, it is made "unlawful to deposit manure of any description upon any wharfsouth of Lehigh and north of Reed streets, provided that nothing herein contained shall prevent the deposit of street dirt on any wharves of the city." The defendant, Bickley, claims the right to store street dirt upon Walnut street, and upon one hundred and sixty-five feet of Walnut street and keep it there continuously during his term by virtue of this proviso. If it be necessary seriously to consider this claim there is a manifest difference in the words and ideas "to store" and "to deposit." To deposit means to place upon or in temporarily; "to store," means to lay up, and implies a prolonged occupation. It cannot be doubted that the proviso means no more than the right to use the public wharves to deposit street dirt for transportation.

The conclusions to which we have come are, that the defendant, Bickley, is obstructing a public highway, a public wharf, and a public landing, to and over which the community have the right of free and unrestricted access; that he has shown no right to do so, and is maintaining a public nuisance.

Relief cannot be had against a public nuisance in a bill in equity brought by a private individual unless he has suffered especial damage. It must, moreover, be an injury distinct from that done to the public at large.

The affidavits show that the plaintiffs are prevented from the full enjoyment of their properties. They are excluded from the use of the street as appurtenant to their properties, and access to them from the

street is cut off. The injury to them is quite distinct from that done to the public, whose right of way only over the street and wharf and landing is obstructed. These injuries, and others which might be enumerated, they suffer, in addition to those which as citizens they are compelled to endure. They are constantly recurring grievances which could not be adequately compensated by damages at law, and must be redressed in equity.

We understand *Audenreid vs. Railroad Company*, 28 Leg. Int., p. 12, to prevent us from granting a mandatory injunction except upon final hearing, we therefore modify the special injunction heretofore allowed, and specially enjoin the defendant Bickley from depositing street dirt for storage upon the premises now occupied by him under his lease from the city.

R. N. Willson and S. C. Perkins, Esqs., for plaintiffs.

[Leg. Int., Vol. 29, p. 204.]

LODGE vs. RAILROAD COMPANY.

1. An appeal may be taken from the report of viewers under the act of February 19, 1849, in all cases where the charter of the railroad company is subject to the provision of that act.
2. The verdict of the jury of view need not be itemized.
3. An excessive verdict will be reduced.

Motion for a new trial. Opinion delivered *June 18, 1872*, by LUDLOW, J.—Five reasons have been filed in support of this motion; they embrace the following points:

1. The right of appeal.
2. The form of the verdict.
3. The substance of the verdict, including the principles upon which it was based.
4. The amount of the verdict.

The first question seems to be settled by express legislation.

The charter of this company, approved July 18, 1863, and to be found in P. L. 1864, p. 1115, and the various supplements thereto, make no reference to any supplement to the general railroad law of 1849, but simply give to the Frankford and Holmesburg Railroad Company, "all the powers," and subject this road "to all the restrictions" prescribed by an act entitled "an act regulating railroad companies," approved February 19, 1849. While this is true, it must be remembered, that when this charter was approved in 1863, a law stood upon the statute book, which expressly declared, that in *all* cases which may hereafter arise under the act of 1849, "any party or parties who may be aggrieved by the report or award of viewers, appointed under said act, may at any time within thirty days after the confirmation of said report, appeal from the same to the Court of Common Pleas by which said viewers were appointed." See act of 1855, P. L. 365.

In 1856, a supplement was passed, which was evidently intended to explain the act of 1855, for in its preamble it is declared that doubts and difficulties had arisen in regard to "the intention and proper construction" of the act of 1855, and in the first section of the act of 1856, it is enacted, "that it should apply to and embrace cases *pending* at the time of the passage of the last cited act of assembly. The language of

the last cited act of assembly only strengthens the view which we take of the proper construction of the act of 1855, and proves, we think, that the only doubt about its true intent and meaning applied to *pending cases* alone. If then this company took its chartered rights subject to, and under the provisions of the act of 1849, and if at the very date of the charter, the act of 1855 had already declared that in *all cases* arising under the act of 1849 a right of appeal should exist, we conclude that the plaintiff in this suit had a legal right to bring this case into this court.

The second objection made to this verdict relates to its form. The verdict was a general one, and it is now contended that as the act of assembly requires the jury to determine the quantity, quality and value of the land taken, the jury should have itemized their finding, and that the verdict should not have been for a gross sum. This question, or one similar to it, arose in *Harvey vs. Lackawanna & Bloomsburgh R. R. Co.*, 11 Wr. 428.

In that case the judge directed the jury to itemize the verdict. The 19th error assigned, relates to this point in the charge, and the court, on page 437, disposes of it, by saying that there was nothing in it, for the verdict closed with a gross sum.

It may be proper and convenient sometimes to enter into detail, but we cannot say that there is error in this verdict as to its form.

Is there anything wrong in the verdict in so far as the principles upon which it was founded are concerned?

The charge of the court fully explained to the jurors the law by which they were to be governed, and no exception was taken to it.

The jury knew they were to determine the quantity, quality and value of the land taken, they were instructed not to award consequential damages, and to make a fair and just comparison of the advantages resulting, or which seemed likely to result to the plaintiff from the location of the railroad through his land. A question of title did arise as to a very small portion of the land taken, but on reflection, I agree with the counsel for plaintiff in the statement that this claim was withdrawn from the jury.

We cannot understand what precise objection can be taken to this verdict simply upon a question which involves the principles upon which it was based.

When it is contended that the verdict upon all the evidence was excessive, we understand the complaint, and we now proceed to discuss that point which is the last presented in this cause.

This trial extended over the period of a week, during which time some sixty-three witnesses were examined.

These witnesses were about equally divided between the parties, and while for the plaintiff the damages sworn to varied from \$15,000 to \$50,000, for the defendant, the witnesses in many instances, testified that the plaintiff was benefited by the road. Under ordinary circumstances, we hesitate to destroy a verdict, because it is excessive, and we only reduce it when we think our path of duty clear. In this instance, this testimony has been very carefully examined, and we are bound to declare that this verdict is too large. The great contention here arose upon the question of the value of land taken for building lots, and then again upon the injury done to the mansion house of the plaintiff.

Incidental questions as to the value of this road as a means for the transportation of goods, etc., from plaintiff's mill to the city, arose and were discussed.

So, also, did the jury hear much testimony upon the actual damage done by the track of the road, as it strikes and runs through the plaintiff's land.

When we look at all this evidence, we cannot forget the small quantity of land actually taken, the route which the road takes through plaintiff's premises, the real position of much of this land said to be valuable for building purposes, and the cost of the whole property, including the mill, when bought by the plaintiff. With these points in mind, we remember that portion of this evidence, which in detail, explains what to us appears to be self-evident, the natural and manifold advantages which must accrue to this plaintiff. We can well understand how a jury hearing witnesses testify to an amount of damages in sums anywhere between \$15,000 and \$50,000, may have been misled, especially when able and astute counsel eloquently discourse upon what would appear to be not a claim for damages against a railroad company, but some gross outrage. Had the witnesses who swore to these enormous amounts given us a detailed account of items, we should have been better satisfied, as it is, however, we think we ought to some extent at least to interfere with the verdict.

The court is of the opinion that the verdict ought to be reduced to the sum of \$5000, which sum is a liberal compensation, for all damage to plaintiff. If in ten days the plaintiff files a release of all claim for damages above this amount, under this verdict, the rule will be discharged, otherwise it will be made absolute.

David W. Sellers, J. P. O'Neill, and I. Newton Brown, Esqs., for plaintiff.

Chapman Biddle, Esq., for defendant.

[Leg. Int., Vol. 29, p. 382.]

ARTHUR H. CRAIGE *et al.* vs. MARY ANN CRAIGE *et al.*

1. A trust may exist though a trustee be not named.
2. A clearly expressed intention of a testator who had the right of private dominion over his own property, should not be destroyed.
3. Public policy demands, even in doubtful cases, the widest latitude of construction where the rights of married women are to be protected.
4. A testator directed as follows: "*I give and bequeath to each of my children an equal portion of my estate, that portion that will be for my daughters, Emily and Matilda, to be invested in safe securities, and the interest to be paid to them. Should either of them die without issue, then to be divided with my other heirs.*" At the date of the will and the death of testator, both daughters were married and are still covert. *Held*: That these expressions of the testator created an active operative trust for the married daughters' portions, the duties of which required constant activity on the part of the trustee.
5. No attention is to be paid to the language of the will which declares that "*should either of them (daughters) die without issue, then to be divided with my other heirs,*" because if a trust for the sole and separate use of these married daughters exists, their estate is an equitable one, and the rule in *Shelly's case* cannot apply.

This was a bill in equity for partition filed by and between the children and devisees of Thomas H. Craige, the elder, deceased, in which a decree for partition had been made, a master appointed, the sale of the real estate, the subject of partition, decreed and made, and the master ordered to divide and distribute the proceeds thereof.

The following is a statement of the principal facts of the case :

Thomas H. Craige, the elder, late of the city of Philadelphia, manufacturer, died May 5, 1865, having first made and published his last will and testament in writing, dated February 6, 1865; the material portions of which are as follows: "After her decease (that is the decease of testator's wife) I give and bequeath to each of my children, an equal portion of my estate, that portion that will be for my daughters, Emily and Matilda, to be invested in safe securities, and the interest to be paid to them; should either of them die without issue, then to be divided with my other heirs."

This will was duly proved and admitted to probate May 11, 1865, by the register of wills of Philadelphia.

The testator left surviving him, nine children, seven sons and two daughters, Emily and Matilda, all of whom have attained their majority.

Both daughters were married at the date of the will, and had been for a long time previously, and are still married.

According to the schedule of distribution contained in the master's report, one-ninth of the net balance in his hands for distribution amounts to \$3857.81.

Frank S. Simpson, Esq., the master, in his report, filed September 20, 1872, awarded the shares of Mrs. Emily Forepaugh and Mrs. Matilda Yarrow, the said testator's two married daughters, as follows:

The will of the testator directs that the portions of his estate, that will be for his daughters, Emily and Matilda, are "to be invested in safe securities and the interest to be paid to them." "Therefore, in accordance with the direction of the will, the master awards one-ninth of the said balance to trustees duly appointed by the proper court, for Emily Forepaugh, wife of Francis H. Forepaugh, to be invested by them in safe securities, and the interest thereof to be paid semi-annually to the said Emily Forepaugh during her natural life, and after her death the principal thereof to be paid and distributed according to the will of said Thomas H. Craige, deceased, and the laws of this Commonwealth."

In like manner the master awarded the remaining one-ninth to trustees for Mrs. Matilda Yarrow.

To this part of the master's report, the counsel for Mrs. Forepaugh and Mrs. Yarrow excepted, urging that the language of the testator's will, did not raise a trust for them, and if there had been a trust created, it had become executed, and therefore the master should have awarded the two shares or ninths to them, the said Mrs. Forepaugh and Mrs. Yarrow, to be paid into their hands freed and discharged from any and all trusts.

Thomas J. Diehl, Esq., for exceptants.

William Ernst, Esq., for trustees.

The opinion of the court was delivered November 30, 1872, by

LUDLOW, J.—It is not an easy matter to decide this cause, and for the reason that it is one of those cases described by Judge Agnew in his opinion in *Dobson vs. Ball*, 10 P. F. Smith, 496, where he said: "The result of these conflicting principles and authorities is, that it is difficult to determine cases lying along the border." If ever there was a cause is

which the principle of private dominion ought to prevail, this is the one, and that too for all powerful reasons. This testator was surrounded by a family of nine children, he had seven sons and two daughters, and these daughters were of full age and married.

The will, not drawn by an expert, proceeds to dispose of all his estate real and personal, and the testator with an intention in view which cannot by any process of reasoning be mistaken, in a few brief words, declares that his sons shall take an estate in fee simple and absolutely, in so far as their interests are concerned, and then he evidently designs to protect his married daughters, for he declares: "I give and bequeath to each of my children an equal portion of my estate, *that portion which will be for my daughters, Emily and Matilda, to be invested in safe securities, and the interest to be paid to them. Should either of them die without issue, then to be divided with my other heirs.*"

It has long been settled, that a trust will not fail because a trustee is not named, and no particular form of words is necessary to create a trust. Hill on Trustees, 4 Am. Ed., p. 654, 655; *Tyson's Appeal*, 10 Barr, 220; *Wright vs. Brown*, 8 Wright, 224. The master in his able report on page 8, cites a number of cases in which expressions of a vague nature have been held to create a trust for the sole and separate use of a *feme covert*. They all throw light upon our path, and may aid us in our present investigation.

In *Jamison vs. Brady*, 6 S. & R. 465, the language was simply "for her own use;" in *Cochran vs. O'Hern*, 4 W. & S. 95, the words used were "for her own and sole use forever;" in *Heck vs. Copinger*, 5 Barr, 385, "to be for her and her family's use, during her life," and in *Snyder vs. Snyder*, 10 Barr, 423, "for her own proper use during life."

The strongest case seems to be found in 10 Barr, 220, *Tyson's Appeal*. There the language used was, "to my sister Hannah, intermarried with Charles Tyson, the interest of \$5000, *to be paid to her in equal half yearly payments,*" with remainder to her children; these words the court held, created a separate estate. In a review of the numerous cases decided in this State, it will be observed that the court of last resort endeavored to sustain the trusts specified for two reasons: First, because of the manifest intention of a testator, and secondly, to protect married women. Even when the decision in *Kuhn vs. Newman*, 2 Casey, 217, shook the law of trusts to its foundations in this Commonwealth, trusts for married women escaped the blow, and as the master says, these trusts "were respected and held sacred and inviolable." If it be true, and the proposition cannot be doubted, as stated by Judge Agnew in *Jones' Appeal*, 7 P. F. Smith, 469, that *Lancaster vs. Dolan*, 1 Rawle, 231, was decided upon grounds of public policy, and to protect the wife against the influence and control of the husband, why should not the same principle be extended to a case in which both the doctrines of private dominion and public policy combine to demand it?

In this instance, the intent of the testator is overwhelmingly clear. It can only be overthrown by a technical application of a certain well-settled rule of law which was never designed to reach such a case as this, where the intention is settled.

If the testator had unfortunately used certain words of definite legal import, or if he had omitted the use of language which would throw

doubt upon his intent, then technical rules of law must be applied, but here where the intent is clear, as we have already remarked, and the object in view altogether proper, it seems to be an act of injustice not to sustain this trust.

We hold, therefore, that when the testator directed the portion of Emily and Matilda "to be invested in safe securities, and the interest to be paid to them," he must have meant to protect them against their husbands, knowing as he did, that they were married, and to place the principal out of their control during coverture; the services of a trustee will be required, and the interest must be paid "to them," that is, to those married women, and not to their husbands. A sole and separate use trust is therefore implied in equity, and a trustee will be appointed.

We have paid no attention to the language of the will which declares that "should either of them (daughters) die without issue, then to be divided with my other heirs," because if a trust for the separate and sole use of these married daughters exists, their estate is an equitable one, and the rule in *Shelly's case* cannot apply.

After what has been already said, it is unnecessary to comment on cases like *Bacon's Appeal*, 10 Wright, 592, and *Rife vs. Gyer*, 9 P. F. Smith, 393, and other kindred causes, because if the trust exists at all, it must be one which will require constant activity upon the part of the trustee; indeed, in no other way can the estate be preserved for the benefit of these married women.

We sustain the report of the master for the following reasons:

1. A trust may exist though a trustee be not named.
 2. The language used in this will is in principle as strong as the language used in other wills, in which the trusts have been sustained by our Supreme Court.
 3. To decide otherwise would be to destroy the clearly expressed intention of a testator who had the right of private dominion over his own property.
 4. Public policy demands even in doubtful cases, the widest latitude of construction, where the rights of married women are to be protected.
- Exceptions dismissed and report confirmed.

[Leg. Int., Vol. 29, p. 382.]

IN RE PETITION OF JOHN A. BROWN.

Presumption of apportionment of a ground rent does not arise because a part owner pays the whole, the ground rent landlord has a right to consider the party paying as agent for parties concerned.

Petition for extinguishment of a ground rent. Opinion delivered November 30, 1872, by

LUDLOW, J.—An examination of the act of assembly of 26th February, 1869, which is in fact a supplement to the act of April 27, 1855, satisfies us that this case does not fall within its terms.

This paramount ground rent not only existed, but has been punctually paid since the year 1792; the present owner did not know of the existence of another owner of a portion of the original lot upon which the paramount ground rent was a charge until a recent period of time.

It is admitted that the rent was never apportioned by deed or other

instrument of writing, and no inference can be drawn from the evidence, which would admit of a constructive consent to an apportionment, because the owners of the rent had a right to call upon any owner of the fee for the payment of the whole rent, and as is stated in the answer, they had a right to consider the party paying as agent for all parties concerned.

The act was intended to reach a class of cases in which an apportionment "by deed or other instrument of writing" had been made, and no rent had been demanded; or where by the "implied act of the parties" an apportionment might be presumed because no demand had been made for twenty-one years. In this instance the rent has confessedly not been apportioned, and by no act of the owners of the rent can we presume such an apportionment, simply because these owners have from time to time received this very rent, and that too from a party legally bound to pay it.

It is unnecessary to consider the question of the constitutionality of the act because the case is not one which it was intended to meet.

Prayer of petition refused and petition dismissed.

[Leg. Int., Vol. 29, p. 68.]

PFUND vs. BERLINGER et al.

To sustain an application for a special injunction the right of the complainant to the equitable relief prayed for must be unquestionably established.

In equity. Motion to continue a special injunction. Opinion delivered February 24, 1872, by

FINLETTER, J.—The bill charges "that the defendant, Berlinger, in violation of his covenants and agreements in the said lease, has let and demised and disposed of the said corner room to the defendant, Johnson, without the consent of your orator; that the said Johnson has taken possession of and now occupies the said corner room, and is making alterations in the same."

There is no allegation in the bill of injury to the plaintiff; nor are there any facts stated from which it may be inferred. This would be fatal on demurrer. As it is, perhaps, an amendable defect, it should not be regarded in the present application. *Commonwealth vs. Pittsburg & Connelssville R. R. Co.*, 12 Harris, 161.

The same defect, however, appears in the affidavits; and we may fairly assume that they set forth no injury to the plaintiff because he has suffered none. This then reduces his case to an averment of breach of covenant without more. "When there is an express covenant and an uncontroverted mischief arising from the breach, equity will grant an injunction to restrain the breach." *Butler vs. Burtleson*, 16 Ves. 176, cited by Sharswood, J., in *McClurg's Appeal*, 8 P. F. S. 54. It follows from this that an injunction should not be granted for a breach of covenant without mischief.

Thompson, C. J., in *Rhodes vs. Dunbar*, 7 P. F. S. 286, says, "Irreparable injury is the foundation for intervention by injunction; not irreparable, because so small that it may not be estimated, but because likely to be so great as to be incapable of compensation in damages."

Hilliard on Inj. 270; 37 N. H. Rep. 254. There must be injury and damage both to justify the remedy by injunction. *Campbell vs. Scott*, 11 Sim. 39." In *Mocanagua Coal Co. vs. The Northern Central R. R. Co.*, Leg. Int., Feb. 9, 1872, Williams, J., says, "A preliminary injunction is never granted for the purpose of enforcing a *mere right*, but only for preventing irreparable mischief. Nor will such injunction be granted when it will subject the defendant to loss without being of any benefit to the plaintiff."

This case furnishes another evidence of the undue tendency to look to courts of equity to vindicate every violated right and redress every wrong. This should not be encouraged. Whilst we are investigating the great equitable wrong which a landlord suffers when his tenant has sublet "a room," "the weightier matters of the law" must stand aside. In *Richards' Appeal*, 7 P. F. S. 113, the chief justice says, "An error seems somewhat prevalent in portions, at least, of this Commonwealth, in regard to proceedings in equity to restrain the commission of nuisances. It seems to be supposed, that, as at law whenever a case is made out of wrongful acts on the one side, and consequent injury on the other, a decree to restrain the act complained of must as certainly follow as a judgment would follow a verdict in a common law court. This is a mistake. It is elementary law that in equity a decree is never of right as a judgment of law is but of grace. Hence, the chancellor will consider, whether he would not do a greater injury by enjoining than would result from refraining and leaving the party to his redress at the hands of a court and jury."

To sustain an application for special injunction the right of the complainant to the equitable relief prayed for must be unquestionably established.

Special injunction dissolved. Bill dismissed.

S. N. Rich, Esq., for plaintiff.

John Flint and George W. Wollaston, Esqs., for Berlinger.

[Leg. Int., Vol. 29, p. 84.]

WINDRIM vs. THE CITY OF PHILADELPHIA *et al.*

1. A contract prohibited by law will not be enforced in a court of equity.
2. The city of Philadelphia can only make a valid contract in accordance with the act of April 21, 1858, section 5.
3. When plans are furnished by an architect and he receives the premium offered for the accepted plan by the city or its officers, the plan, and not the idea, becomes the property of the city. A custom among architects to retain such plans binds no one else.

In equity. Opinion delivered March 9, 1872, by

PAXSON, J.—The plaintiff in this case has no equity. He claims to be the architect of the city of Philadelphia for the erection and construction of the house of correction, and he asks this court that said city of Philadelphia and the councils thereof, may be ordered and decreed to provide by ordinance for the execution of a proper and formal contract with said plaintiff for his employment as architect of said house of correction; or, on failure to do so, that they be ordered and decreed to pay said plaintiff an amount equal to five per cent. upon the contract price of said building.

Five per cent. upon the contract price would amount to within a fraction of the sum of fifty thousand dollars. This compensation is so manifestly extravagant that were the plaintiff entitled to relief, a court of equity would hesitate long before making such a decree. But the plaintiff is not in a position to ask for any relief whatever of this court. His case briefly stated is, that he was employed as architect by the committee of councils having in charge the building of said house of correction, without any agreement as to compensation. He stated to them that his terms would be five per cent. upon the entire cost of the building. Subsequently he reduced his claim to three and a half, and later to three per cent. The latter amount seems to have been satisfactory to councils from the fact, as we learn by plaintiff's bill, that on the 28th day of July last, they passed an ordinance, providing for the employment and payment of plaintiff as architect of the building referred to. This ordinance, however, was vetoed by the mayor, and subsequently councils, by ordinance, employed the defendant, Furness, as architect.

It is unquestionably true, that plaintiff, for a considerable period of time, acted as architect for said building, with the knowledge and approval of said committee. But it is equally true that no committee of councils has authority to bind the city of Philadelphia by contract. The fifth section of the act of the 21st of April, 1858 (P. L. 386) provides, "that no debt or contract hereafter incurred or made, shall be binding upon the city of Philadelphia, unless authorized by law or ordinance and an appropriation sufficient to pay the same be previously made by councils: *Provided*, That persons claiming unauthorized debts or contracts may recover against the person or persons illegally making the same." This section, as was well observed by Judge Thayer, in *Bladen vs. The City*, 6 Phila. R. 586, may be called "the palladium of Philadelphia tax-payers. It furnishes probably the best protection which it is possible to devise against the improvidence, the incompetency, the dishonesty and the corruption which are perpetually hiding themselves in the recesses of great corporations." This act of assembly is notice to the plaintiff, and all the world, that there is but one method by which a contract can be made binding upon the city. It is a flat bar to any recovery by the plaintiff in an action at law. This was virtually conceded upon the argument; and it was because the plaintiff was without a remedy at law that the equitable powers of the court were invoked in his behalf. But it does not follow that a party is entitled to relief in equity merely because he has no remedy at law. There may be cases in which neither law nor equity can be successfully invoked. Where an alleged contract is against law, or in violation of law, a chancellor will not aid in enforcing it. Here there was no contract whatever between the plaintiff and the city. The plaintiff's bill shows there was no express contract, and there can be no such thing as an implied contract against the city. To bind the latter the contract must be expressly authorized by law or ordinance. Were we to hold that a contract made by a committee of councils or a head of department, not authorized as aforesaid, could be enforced in equity, we should practically annul by a judicial decision, the act of assembly referred to, and destroy at a single blow the most important protection which the law has interposed for the protection of the tax-payer.

It is no answer to say that the plaintiff has given valuable services to the city, for which he has received no compensation. It may be a hardship to the plaintiff. If so, it is one beyond our power to remedy. It was competent for him to have insisted upon a contract with councils before he undertook the work. We cannot strain the law to relieve against this omission on his part. His only remedy is to accept such compensation, if any, as councils may voluntarily tender him, or look to those who employed him, if they have employed him illegally.

The prayer that we shall order and decree councils to enter into a contract with the plaintiff, is open to objections of an equally serious nature. The practical effect of this would be to compel councils to ratify whatever its committees may do without authority. And were we disposed to exercise a power of so very questionable a character, we should require very clear proof that the rate of compensation was a proper one, and that the contract itself was such that in equity and good conscience it ought to be enforced against the city. But, for the reasons above stated, we have no hesitation in saying that this prayer must be denied.

The only other point to be noticed is the prayer for an injunction to restrain the defendants from using the plans, specifications and designs invented by plaintiff, in the further erection of the said house of correction.

The plans referred to were furnished to the city by plaintiff in pursuance of an advertisement on the part of the city authorities, offering a premium of eight hundred dollars for the best plan for the said building. The plaintiff's plans were accepted, and he was paid the premium therefor. He alleges, however, that notwithstanding his receipt of the premium, that the plans still remain his property; that the premium was not paid for the plan, but for the idea, the thought which produced it, and which is embodied therein. There would have been some force in this if the city had advertised for an "idea." But the advertisement was for a plan. Nor is there any analogy between such case and the offer of premiums by the Franklin Institute. In the latter instance and others of a similar character referred to upon the argument, the premiums are offered as an encouragement to manufactures, science and art. The competitors place their articles on exhibition merely. Those who are successful receive the premiums and their articles are returned to them. The city, in offering a premium for the best plan, did not do so for the purpose of encouraging or promoting the interests of architecture. It was purely a matter of business. The object was to procure a suitable plan for the house of correction. The plaintiff having furnished a plan which was delivered to and accepted by the city, and the premium therefor paid to the plaintiff, I know of no decided case or any rule of law which authorizes him to demand said plans back from the city. It is true there seems to be a custom with architects to retain the plans in such cases, unless the architect whose plan is adopted is employed in the erection of the building. This may be a very good custom among architects as between each other, but it binds no one else. Different classes of professions may very properly adopt certain rules for their own government, and for the regulation of their particular business. The mistake is in giving to them the force of law, and supposing they can affect other persons not parties to the arrangement, and who have no knowledge thereof.

I understand that the original plans are in the possession of the plaintiff. A copy thereof was, however, attached to the contract between the city and Mr. Dobbins, with plaintiff's consent, and it is the use of this copy of which the plaintiff complains. It is sufficient to say in answer to this, that in our opinion the city is entitled to the use of the original. The right to use a copy follows, of course.

So far as the relief prayed for in this bill, practically amounts to an injunction against the erection of the house of correction, we are compelled to refuse it by reason of the act of 8th of April, 1846 (P. L. 272), which declares, "that no court within the city and county of Philadelphia shall exercise the powers of a court of chancery in granting or continuing injunctions against the erection and use of any public work of any kind erected or in progress of erection, under the authority of an act of the Legislature, until the question of title and of damages shall be finally decided by a common law court."

This case was before the court recently upon a motion for a special injunction. The injunction was refused by President Judge Allison, who delivered an opinion in which the facts of the case, with the law as applicable to the motion before the court, were reviewed at considerable length. This would seem to render a more extended reference to the law and the facts at the present time unnecessary.

The bill is dismissed with costs.

Samuel C. Perkins and George W. Biddle, Esqs., for plaintiff.

W. J. McElroy, Esq., and Charles H. T. Collis, city solicitor (with whom was George D. Budd, Esq.), for the city of Philadelphia.

Hon. Henry M. Phillips, for R. J. Dobbins.

Victor Guillou, Esq., for F. Furness.

[Leg. Int., Vol. 29, p. 220.]

**IN THE MATTER OF THE EXCEPTIONS TO THE SUPPLEMENTARY
REPORT OF JURY ON CLAIM OF MARK DEVINE AND SUSAN
ROOT FOR DAMAGES FOR PROPERTY TAKEN BY FAIRMOUNT PARK.**

A jury in assessing damages for taking land for Fairmount Park, may consider the advantages accruing to the owner from the portion of his land not taken.

The act of June 15, 1871, does not affect this question.

A partition by amicable action or conveyance after the taking by the park, does not alter the status of the party claimant.

Opinion delivered July 6, 1872, by

ALLISON, P. J.—The original report of the jury was set aside, because benefits were assessed against other property of the claimant, adjoining or in the neighborhood of the land taken for the use of the park, and within the lines or boundaries of the same. The Legislature had passed an act of assembly a few days before said report was filed, forbidding such assessment of benefit against adjoining lands.

The claimant excepts to the supplementary report of the jury upon several grounds. The first of which is, that no damages have been awarded to him, although nearly one-half an acre of his land has been taken by the city.

Mark Devine was the owner of about five acres and a half of ground, of which the triangular lot, mentioned in the report as taken by the

city, is a part; but which is now separated from the remaining portions of the tract, by Thirty-third street, which has been opened for public use since the title to the land within the lines of the park became vested in the city. It was asserted on the argument that Thirty-third street was opened by direction of the park commissioners, through the tract of land in question.

The exceptant argues to the court, and asks us to adopt the view presented by him, that it was error in the jury, to take into consideration the advantages which the park added to the balance of the land; that by the opening of Thirty-third street, the ground taken was severed from the body of the land, and thereby became a separate and distinct tract, and as the city have taken the whole of the triangular lot, damages ought to have been awarded to the owner.

Section third of the act of March 26, 1867, which authorizes the taking of land for a public park and vests the title of the same in the city of Philadelphia, provides, that the owners of said land shall be paid for the same by the city of Philadelphia, according to the value which shall be ascertained by a jury of disinterested freeholders. It is further provided in said section, that the jury shall estimate the advantages to property adjoining or in the vicinity, and directs that the jury shall proceed, and their award shall be reviewed and enforced in the same manner as provided by law, in the opening of roads in the city of Philadelphia. The right to estimate and assess advantages upon adjoining property and in the vicinity, was taken away by the act of the 15th of June, 1871, P. L. 391. In all other respects the act of 1867 is in full force. This act recognizes the constitutional right of the owner of property taken for public use, to be compensated for the land thus appropriated, the value to be ascertained by a jury; the subsequent portion of the third section declares it to be the duty of the jury, to assess the damages for the property to be taken as aforesaid.

It was, therefore, the undoubted duty of the jury to find first, the value of the land, and then ascertain what damages, if any, the owner sustains by reason of the taking; but it is nowhere in the act made the duty of the jury to report to the court, the sum or price at which they estimate land appropriated by the city, but they must decide upon and make report of the sum which shall be paid to the owner as his proper damages, if they find that he has sustained damage. The material inquiry, therefore, is what is the money value of the injury or damage for which compensation must be made, and this inquiry the report shows, was taken up by the jury, and prosecuted to a result, they finding that claimant had sustained no damage, because they say, taking into consideration the value of the ground taken, and the advantages of the park to the price of ground left, Mark Devine has sustained no loss. The finding of the jury is, that he is benefited as much as he is injured, and to this judgment of the jury, exception is taken, first, as to the fact found that no damages have been sustained and also to the reasoning upon which the conclusion is based as it is set forth in the report.

These exceptions are not, we think, well founded; the requirements of the act relating to the assessment of damages have in form as well as in substance been complied with. We have uniformly held, that the general provisions of the road laws, in as far as they were applicable,

must govern in the ascertainment of the amount of damages sustained by an appropriation of land for the park ; and if we are right in this conclusion, then the jury were not only justified, but were required to take into consideration, the advantages as well as the disadvantages to the claimant, and if they have found the former were equal to the latter, then no damages could be awarded. It is in our opinion an entire misapprehension of the act of 1871, to construe it as controlling the action of the jury in this respect. That act does no more than forbid the assessment of damages upon adjoining or neighboring property, as may be done where land is taken for a road or street, and where the jury find that the opening of such road or street is a benefit to the adjoiners, or to property in the vicinity, or on the line of the street. But this in no way affects the general question of the duty of the jury to make inquiry as to advantages, as well as to disadvantages, and to set off one against the other ; this is what they have done in this case, and to this action we think no well-grounded objection can be taken.

Upon the question raised by the exception, that the opening of Thirty-third street makes of the portion of the land not taken a separate tract, so as to render inapplicable the law which we hold governs, where part only is taken, it is sufficient to remark, that if the fact be as we understood upon the argument was the case, that Thirty-third street was opened after the passage of the act of assembly, authorizing the commissioners to take into actual use, the piece of ground for which damages are claimed, then this exception falls out of the case, the time of legal taking or vesting title in the city of Philadelphia being fixed by the passage of the law under which the land was actually appropriated to park purposes. The land was then taken, subject to the right of the owner to have compensation made to him, according to law. But if the fact be otherwise, as to the opening of Thirty-third street, and if it was opened for public use, before the passage of the act defining this portion of the park lines, the legal conclusion is not changed. Mark Devine is still the owner of the fee of that portion of his land, which was taken by the opening of Thirty-third street, it remains a part of the original tract, of which the public have the use only, the ownership is not changed, and when the city abandons the use, the possession of the ground reverts to the claimant. Upon neither view can it be successfully maintained, that the part taken and the part which remains are separate and distinct lots or tracts of land.

The several questions raised by the exceptions are all embraced in what we have said upon the general subject, to which they refer, and the views above expressed require us to dismiss the exception, and to confirm the report of the jury.

The same conclusion is reached upon the exceptions filed to the supplemental report of the jury upon the claim of Susan Root, for property within the park limits, and bounding on Thirty-third street. The amount of land taken is two and nine-tenths acres, and balance of the tract is nine and nine-tenths acres or thereabouts. The jury return that no damage is sustained by the claimant, because she is benefited as much as she is injured. In the original report, the jury found the value of the land taken to be \$7000, and the benefits which the park conferred on the balance of the land amounted to \$13,000, and assessed

the difference, namely, \$6000, upon the nine and nine-tenths acres. From this assessment, Mrs. Root was relieved by timely legislation, the report having been filed on the fourth day after the passage of the act of June 15, 1871.

Not satisfied with gaining \$6000, with which her land would have been charged, but for the act of 1871, upon confirmation of the report, she now asks compensation for the lot within the limits of the park. To this we think she is not entitled, as no sufficient reason has been made to appear for setting aside the report of the jury. For reasons assigned in the case of Mark Devine, and which are applicable to this claim, we hold that the jury was justified in estimating advantages as well as disadvantages to property of Mrs. Root, and we are equally clear in our judgment, that an amicable partition of the estate by Susanna Root, one year after a part of her land had been appropriated for park use, cannot alter her status as a claimant for damages. This would be the easiest of all devices to avoid the operation of the law, and give to the party who should resort to it, an advantage to which he would not otherwise be entitled. Treating the conveyance by Susanna Root to her son George, as honest and *bona fide*, it was after the rights of the city had attached and in disposing of the claim for damages the jury were justified in acting upon the question, as it stood, when title vested in the city of Philadelphia.

Exceptions dismissed and report confirmed.

George W. Thorn, Esq., for Mark Devine.

Joseph B. Townsend, Esq., for Susanna Root.

Charles Henry Jones, Esq., solicitor for Fairmount Park, for the city.

[Leg. Int., Vol. 29, p. 341.]

COMMONWEALTH vs. CHRISTIAN.

Trustees of an insurance company, one of whom was its solicitor, and the other its travelling agent, the by-laws not designating these as officers: *Held*, that thereby they did not become "officers" thereof, and within section 66 of the criminal code.

The plaintiffs filed a suggestion alleging that the defendants held incompatible offices in the Penn Mutual Life Insurance Company; that in January, 1872, they were elected trustees, and at that time, Mr. McBride was a solicitor of insurances, and Mr. Kent the adjuster of risks and other business matters beyond the State of Pennsylvania; that these latter positions or occupations were offices, and held in violation of the 66th section of the act of 31st of March, 1860.

Suggestion prayed for a judgment of ouster against the defendants.

Answers were separately filed by the defendants admitting the retention of the offices as trustees, but denied that the said occupations of the defendants were offices, either within the letter and spirit of the act of 1860, or under the charter and by-laws of the company.

Demurrers were filed to the answers.

E. S. Miller and S. H. Norris, Esqs., argued that the act of 1860 was broad enough to embrace all corporations, general as well as private, and relied on the language of the act as being comprehensive enough for that purpose.

William Ernst, Esq., for McBride, and *William S. Price, Esq.*, for Kent, argued that the act of 1860, as reported by the commissioners to revise

the criminal code, applied expressly to public corporations, and not private corporations. It was intended to prevent embezzlement by public fiscal officers who have the custody of public moneys. The consolidation act of 1854 has a similar provision.

The act of 25th April, 1855, in its proviso, preserved the rights of private corporations then secured by their respective charters, from the operation of the act of 1860.

The distinction between public and private corporations was plainly before the Legislature.

The only case thus far decided under the act, is the *Commonwealth vs. Allen et al.*, decided in March, 1872. The Supreme Court then applied the provisions of the act of 1860 to three councilmen, who had become sureties on the city treasurer's bond, and gave judgment of ouster against them.

It has never yet been applied to private corporations.

Its penalties if applied to a life insurance company, would occasion a forfeiture of membership and a destruction of the life policy.

The forfeiture is not only of the office but of membership in the company.

Opinion delivered October 19, 1872, by

PAXSON, J.—By this writ of *quo warranto*, the defendants are required "to show by what authority they claim to have, use and exercise the office, rights and powers of trustees of the Penn Mutual Life Insurance Company." In the suggestion filed, it is alleged by the relators that the defendants have violated the provisions of the 66th section of the criminal code, *Purd.* 229, pl. 74, in this, that having been duly elected trustees of said company, and entered upon the performance of their duties as such trustees, the said James H. McBride was duly appointed solicitor of said company, and received commissions on insurances made in said company, and still is so engaged; and that the said Rudolphus Kent was duly appointed agent of said company, and received and is still receiving a salary of \$5000 per annum as such agent.

The defendants have respectively filed an answer under oath to the above suggestion. The answer of defendant McBride admits that he is one of the trustees of said company, but denies that he is an officer thereof (excepting as such trustee) and that the only appointment he holds from said company is that of solicitor of insurance; that he receives no salary therefor, his only compensation being a commission on such insurances as he may bring to and are accepted by said company. The answer of Rudolphus Kent also admits that he is a trustee, but alleges that he holds no other office in said company. That he has been appointed general travelling agent thereof, at a salary of \$5000 per annum, out of which sum he is obliged to pay his travelling expenses. That his duties consist of the adjustment of losses and other business out of this city.

The relators demur to the said answers, and this raises the question, whether the latter are sufficient in law. The demurrer admits the truth of all the allegations contained in the answer.

We are saved the necessity of deciding in this case, whether the act of 31st of March, 1860, before referred to, applies to private corpora-

tions, or only to those of a municipal or public character, by the fact that conceding the said act to apply to private corporations like this, the defendants do not come within its terms. Its language is: "It shall not be lawful for any councilman, trustee, manager or director of any corporation, municipality, or public institution, to be at the same time a treasurer, secretary, or other officer subordinate to the president and directors, who shall receive a salary therefrom," etc. It is conceded that neither of these defendants is a secretary or treasurer of this company. Is he an officer thereof? The word officer, as applied to a corporation, is a technical term, and has a legal meaning. Bouvier defines an officer to be one "who is lawfully invested with an office." Accepting this definition, which is as clear as it is concise, we are led to the inquiry, what office did these defendants fill? An office, according to the same authority, is "a right to exercise a public function or employment, and to take the fees and emoluments belonging to it." Offices may be classed into two kinds, public and private. The former may be subdivided into political, judicial and ministerial. The political offices are such as are not connected immediately with the administration of justice, or the execution of the mandates of a superior officer. The offices of governor, of the heads of departments, of the members of the Legislature, are of this number. Judicial offices are those which relate to the administration of justice, and which must be exercised by persons of sufficient skill and experience in the duties which appertain to them. It is laid down by Lord Coke, that "if an officer, either in the grant of the king, or of a subject, which concerns the administration, proceeding, or execution of justice, or the king's revenue, or the Commonwealth, or the interest, benefit, or safety of the subject, or the like, be granted to a man that is inexpert, and hath no skill in science to exercise or execute the same, the grant is merely void, and the party disabled by law, and incapable to take the same, *pro commodo regis et populi*; for only men of skill, knowledge and ability to exercise the same, are capable of the same, to serve the king and his people." Here I will remark in passing, that it is to be feared the sound rule laid down by Lord Coke is not always observed at the present time. Ministerial offices are those which give the officer no power to judge of the matter to be done, and require him to obey the mandates of a superior. All of these offices are of a character to concern the general public. But private offices are of a different nature. The incumbents perform no duty for, and owe no obligation to the public. The most numerous of the latter class are those which belong to private corporations, many of which are of a moneyed character, such as banks, insurance and railroad companies. A large number exist, however, for charitable and religious uses. These defendants clearly are not public officers. If they fill any office at all, it is one which comes within the description of a private office. As a general rule, the offices pertaining to a private corporation are defined in its charter and by-laws. An officer of a corporation has certain rights which are incident to his position, and which are not enjoyed by a mere employee. His duties, the mode of his election, and his term of office, are defined by the fundamental law of the corporation itself. If illegally excluded from his office, he has his remedy by *mandamus* to compel the corporation to reinstate him. He may not be ejected therefrom during

his term, except for good reason. The power of amotion is incident to every corporation, but it can only be exercised in the case of an officer for cause shown. Not so with a mere employee. He may be dismissed with or without cause, and in such case could not claim successfully to be reinstated. A writ of *mandamus* would not lie for such a purpose. A mere employment, no matter how liberally compensated, does not rise to the dignity of an office.

By the fifth section of the charter of the Penn Mutual Life Insurance Co. it is provided that: "All the corporate powers of the said company shall be exercised by a board of trustees, and such officers and agents as they may appoint." The trustees have designated who the officers shall be by section 2, article 3, of their by-laws, which said section is in these words: "The officers of the company shall be as follows: A president, a vice-president, an assistant vice-president, and actuary, and a secretary, who, excepting the vice-president, shall not be a trustee of the company." The defendants do not come within either of these descriptions. But it is urged that a corporation may have officers not recognized by the charter and by-laws. It is possible this may be so as to matters arising between strangers and the corporation. But then relators are members of this corporation, and the charters and by-laws are conclusive upon them.

We are of opinion that the defendants are not officers of the corporation excepting as trustees. It can hardly be alleged that a canvasser who is employed to solicit insurance, and who receives a commission for his services, or a travelling agent, no matter what his compensation, or how paid, is an officer of the corporation. But these relators urge, that if only agents, the defendants still come within the spirit of the act referred to. There is force in this, but we are considering a highly penal statute, and it must be construed strictly. Were we to enlarge the terms of such statutes by judicial interpretation, our criminal law would lose its element of certainty, and become as the shifting sands of the sea. The Legislature seems to have understood the distinction between an officer of a corporation and a mere agent, for in the same section of the said act, when they come to refer to, and define the offence of, officials becoming interested in any contract for the sale or furnishing of supplies, they expressly include any "agent," as well as the officers of the corporations referred to therein.

We regard the act of assembly under which this proceeding is based a highly beneficial one, but we do not think the defendants come within its terms.

Judgment for the defendants upon the demurrer.

[Leg. Int., Vol. 29, p. 341.]

ENGARD vs. O'BRIEN.

A transcript will not be struck off on motion.

Sur rule to strike off transcript. Opinion delivered October 19, 1872, by

PAXSON, J.—It has been repeatedly held that we have no power to strike off a transcript, nor open the judgment entered thereon. *Dailey vs. Gifford*, 12 S. & R. 72; *Lacock vs. White*, 7 H. 495; *Burton vs. Sulger*, 7 Leg. Int. 407. The remedy is by appeal or certiorari to the

original judgment. In this case the defendant was adjudicated a bankrupt a few days after the recovery of the judgment before the alderman, and before the filing of the transcript in this court. It is alleged that the plaintiff had no right to file said transcript, for the reason that the 21st section of the act of Congress, known as the bankrupt act, directs a stay of proceedings in cases where suits have been brought or judgments recovered against a bankrupt, until the final discharge of said bankrupt. We do not see that the act referred to furnishes a sufficient ground for the action invoked. Should the plaintiff attempt to proceed, either upon the transcript, or the judgment before the alderman, the defendant can apply for a stay of proceedings, and if he shows he is entitled thereto, will no doubt obtain it.

Rule discharged.

[Leg. Int., Vol. 29, p. 341.]

BEDFORD vs. POTTER.

Where plaintiff's equity is in doubt, injunction will be dissolved.

Sur motion to dissolve special injunction. Opinion delivered *October 19, 1872*, by

PAXSON, J.—Whether a court of equity, upon final hearing, would decree specific performance in this case, is not the point now under consideration, and in regard to which I do not express an opinion. What we do decide is, that the case as now presented does not exhibit such a clear right on the part of the plaintiff, as would justify us in continuing the *ex parte* injunction heretofore granted. The affidavits filed on behalf of the defendant leave the plaintiff's equity in considerable doubt. While time may not be of the essence of the contract in this case, there would yet appear to have been considerable unnecessary delay, if not negligence, on the part of the plaintiff. His allegation that certain mortgages were in the hands of the Franklin Fire Insurance Company, and not likely to be sued out, might have influenced the defendant. In fact he swears they did. Again, defendant's affidavits positively aver that plaintiff had no title, legal or equitable, to properties which he was to convey to defendant. The plaintiff, in his affidavit, admits that his brother held the title to this property, but avers that he, plaintiff, had the control of it. He does not say, however, in what way he has control of it, and gives us no light as to how he could compel his brother to convey. To entitle a party to a decree for specific performance there must be mutuality in the contract. This is well settled by *Bodine vs. Glading*, 9 H. 50; *Meason vs. Kaine*, 13 P. F. S. 335; *Lex vs. Huber*, 3 W. 367, and other cases.

Injunction dissolved.

E. L. Boudinot, Esq., for plaintiff.

S. Wetherill, Esq., for defendant.

[Leg. Int., Vol. 29, p. 404.]

THE COMMONWEALTH OF PENNSYLVANIA *ex rel.* F. CARROLL BREWSTER, ATTORNEY GENERAL, *vs.* MAHLON H. DICKINSON, CHIEF COMMISSIONER OF HIGHWAYS.

The act of May 6, 1872, authorizing the opening of Fifteenth, Sixteenth and Norris streets, declared unconstitutional on the ground that it contravenes the constitutional provision of 1864, prohibiting any bill containing more than one subject.

Demurrer to return to alternative writ of mandamus. Opinion delivered *December 14, 1872*, by

PEIRCE, J.—The principal question made by this demurrer is the constitutionality of the act of assembly under which the proceeding is had.

The Legislature passed an act approved the 6th of May, 1872, entitled, "an act to authorize the opening and paving of certain portions of Fifteenth, Sixteenth, and Norris streets."

This is the full title of the act. It proceeds to lay out the said streets through Monument Cemetery, and directs the chief commissioner of highways, within sixty days, to cause said streets to be opened and paved. It repeals the third section of an act relating to Monument Cemetery, in Philadelphia, passed March 15, 1847, as to the opening of the streets herein directed; and directs that, in assessing damages for said opening, the cost of a suitable enclosure of said cemetery ground, on said streets, shall be allowed.

To the alternative writ of mandamus the chief commissioner of highways made return as follows:

First. That this defendant is informed, and believes it to be true, that the Monument Cemetery Company of Philadelphia, the corporation named in the act of the general assembly of the Commonwealth of Pennsylvania, passed March 15, 1847, and referred to in the acts of assembly cited in the said writ, being advised that said act of March 15, 1847, was in some of its provisions unconstitutional, at a formal and regular meeting of its corporators, in the year 1847, rejected the whole of the said act of assembly, and refused to accept the same.

Second. That on the 12th of March, 1849, the said general assembly passed an act entitled "an act relating to the Monument Cemetery of Philadelphia," which was duly and legally accepted by the said corporation; the third section of which is in these words, viz.: "That no streets or roads shall hereafter be opened through the grounds of the said cemetery company occupied as a burial ground, except by and with the consent of the managers thereof." That this last act is wholly unrepealed and in full force. That the streets mentioned in the said writ, if opened as demanded, will pass through the grounds of said Monument Cemetery Company, occupied as a burial ground, and that the managers thereof have not given their consent thereto.

Third. That whilst it is true that there are no interments of human bodies actually made in the parts of said cemetery grounds which will be occupied by said streets, if opened as demanded through the same; yet there are such interments in close proximity thereto, and that the opening of said streets as demanded, will necessarily destroy, to a great

extent, the privacy and sacredness of said burial ground, and entail very large cost upon the said cemetery company, and that the whole of the ground proposed to be taken by the opening of said streets is occupied by said cemetery company for a burial ground, and for no other purpose.

Fourth. That if the said act of March 15, 1847, was, prior to its attempted repeal, a valid act and part of the charter of the said "The Monument Cemetery Company of Philadelphia," which was originally incorporated by the Commonwealth of Pennsylvania, by the act passed March 19, 1838, then the act of May 6, 1872, is unconstitutional, so far as it attempted to repeal the third section of the act of March 15, 1847.

To this return the relator filed a demurrer and assigned cause as follows:

First. That neither the act of March 15, 1847, or of March 12, 1849, disabled the Commonwealth from opening highways on compensation being made for the land taken.

Second. That the enactment of May 6, 1872, in said alternative writ of mandamus recited, abrogated any previous law requiring the consent of any citizen of the Commonwealth to the opening of the streets named in said enactment.

Third. Because the said return is in other respects uncertain, informal, insufficient, and defective.

At the hearing the respondent made the following additional return to said writ, to which the relator also demurred:

Fifth. That the said act of assembly of May 6, 1872, is unconstitutional, because its title does not clearly express the subject which, it is alleged, the said act was intended to cover, as is required by the second amendment to the Constitution of this Commonwealth, adopted in 1864.

Sixth. That the said act of assembly of May 6, 1872, is too uncertain and indefinite in its terms to be capable of being either understood or enforced.

It does not seem necessary to consider more than the fifth cause shown by the respondent in answer to said writ.

The constitutional provision of 1864, above referred to, is in the following words:

"No bill shall be passed by the Legislature containing more than one subject, which shall be clearly expressed in the title, except appropriation bills."

The object of this constitutional provision was not only to prevent the great mischief of multifarious subjects of legislation being embraced in one bill, but also to give clear and distinct notice, by the title of the bill, to the legislators and the people of the matter proposed to be enacted. It was intended as a check upon improvident and improper legislation, and as a means by which all persons interested might know what laws the Legislature proposed to enact.

The courts, in construing this section of the constitution, have said that it does not require that the title to a bill shall be an index to its contents, but that the various provisions of a bill must be germane to the single subject of legislation, and that the bill must clearly indicate what that subject is.

Perhaps the earliest decisions of the Supreme Court were not sufficiently precise in defining the limits of the titular description of an act, but the recent cases of *appeal of the Union Passenger Railway Company* and *appeal of Alfred Dorsey and McMackin, Donnelly & Co.*, Leg. Int., Nov. 29, 1872, p. 380, have decided that the subject of legislation must be clearly expressed in the title, and should be so certain as not to mislead.

If we test the act under consideration by the principles of these late decisions, we find it clearly defective and obnoxious to the constitutional objection.

It is entitled "an act to authorize the opening and paving of certain portions of Fifteenth, Sixteenth and Norris streets."

It does not say in what city or town these streets are. The legislative or other inquirer would in vain endeavor to determine and locate the subject of legislation by the title of the bill. The whole Commonwealth would lie before him as the field of inquiry to which the legislation might be applied. And if streets of a like name were found in two or more cities or towns of the State as would very likely be the case, he would be wholly uncertain to which of them the legislation was intended to apply. And if he were to look to the body of the bill he would only learn by implication that the streets referred to are located in the city of Philadelphia.

This act seems therefore to be clearly within the prohibition of the second amendment to the Constitution adopted in 1864.

If this were a court of last resort, it might be deemed advisable to express an opinion upon the other questions raised by this demurrer, but as this decision disposes of the whole matter upon the constitutional objection raised, it does not seem necessary that we should say more.

Judgment for the defendant on the demurrer.

David W. Sellers, Esq., and *Attorney-General F. Carroll Brewster*, for the Commonwealth.

Robert N. Willson, Esq., for defendant.

George Junkin and Charles Gilpin, Esqs., for Monument Cemetery.

[Leg. Int., Vol. 29, p. 404.]

PHILADELPHIA, WILMINGTON & BALTIMORE R. R. Co. vs. THE CITY OF PHILADELPHIA AND MAHLON H. DICKINSON, CHIEF COMMISSIONER OF HIGHWAYS.

The Philadelphia, Baltimore and Wilmington Railroad Company have no right to prevent the opening of Fifteenth street, through their property at Broad street and Washington avenue. Although it will be a great inconvenience, it will not destroy any franchise of the company.

Opinion delivered *December 7, 1872*, by

PAXSON, J.—This was a motion to continue a special injunction granted by this court, restraining the defendants from opening Fifteenth street through that portion of plaintiff's property known as the Baltimore depot.

The bill sets forth, that in the year 1850, the plaintiffs purchased a large lot of ground, bounded by Broad, Carpenter, Sixteenth and Washington streets, now in the Twenty-sixth ward of the city of Philadelphia,

for the purpose of constructing thereon a large terminal depot, for their railroad in said city; that since that year until the present time, the entire said lot has been used for the depot purposes of the said plaintiff; that it is almost literally covered with passenger and freight depots, and with railroad tracks, which are either extensions of the main tracks of the plaintiff's railroad into the said buildings, or sidings or turnouts branching therefrom; that the cars and engines are constantly passing upon the said tracks, either when arriving at or being despatched from the said depots, or when being arranged or drilled thereon; that the said street, if opened in the manner indicated in the notice received by plaintiffs from the chief commissioner of highways, will occupy a strip of ground about fifty feet in width, extending through the said lot, which strip is now partly occupied by a coal and wood-shed and platform, and will divide the said lot into two parts of about equal size; that if the street is opened, the passenger and freight depots on the said lot will be entirely separated and cut off from the railroad, to which they are appurtenant, and the use of the said lot for depot purposes, and for the terminal operations essential to the working of a railroad, will be rendered utterly impracticable; that the said strip of ground which will be occupied by the proposed street, is crossed by not less than seventeen railroad tracks, or thirty-four rails, within a distance of about three hundred and fifty feet, and that all of these tracks are in constant use; that engines and trains cross the said strip at least two hundred times a day, or about once in every four or five minutes during the working-day, and that frequently two or three engines or trains are passing or repassing at the same time; that some of these tracks are constantly occupied by standing trains, engaged in receiving or delivering passengers or freights; that the use of the said strip of ground as a public highway for vehicles and passengers on foot, would be entirely inconsistent with the retention and use of the said tracks, owing to the continuous and imminent risk that would ensue to the lives and limbs of persons undertaking to walk or drive along the said street, which risk, the utmost vigilance on the part of the plaintiff's agents, would be inadequate to guard against, and owing to the incessant obstructions and interferences to which the plaintiff's business would be subject, and that the plaintiff has not, nor can it acquire any other ground suitable for depot purposes, on the line of its road east of the river Schuylkill; that the removal of its depot to the line of its road, on the west bank of the Schuylkill, below Gray's Ferry bridge, would be injurious to the interests of the city of Philadelphia, and to those of the plaintiff, and that unless such removal was made to a very considerable distance from the built up portions of the city, the plaintiff would be exposed to the risk of having streets opened through any lot of ground which it might acquire for depot purposes; and that, in fine, the proposed opening of the said Fifteenth street would be destructive to the rights and franchises conferred by plaintiff's charter, and a violation of the contract contained therein.

The plaintiff resists the opening of said street for the reason, *inter alia*, that the seventh section of the act of April 21, 1855, entitled, "A supplement to the act consolidating the city of Philadelphia," was not intended to authorize, nor can it be construed as authorizing the city of

Philadelphia to open streets through ground which has been appropriated to railroad purposes, and subjected to the franchises of a railroad company; that no provision is made in the said section, nor in any section supplementary thereto for the assessment of damages, for the injury to or destruction of the said franchises which may result from such opening; and that if the said section must be construed as so intended, it is in violation of the clause of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts; that the damages which will result to the plaintiff from the opening of the said street have not been assessed, nor has any security been given by the said city of Philadelphia for the payment of such damages.

We will consider first the question whether the opening of said street through the depot property would be a destruction of the franchises of said corporation, and whether the doing so would violate any contract, expressed or implied, between the city of Philadelphia and the railroad company aforesaid.

The latter acquired title to this property by three separate conveyances, two of them bearing date in January, 1850, and the other in January, 1851. These conveyances recognize and refer to Fifteenth street (then called Schuylkill Eighth street) as crossing the premises therein described; and the same appears on the plan annexed thereto. At the date of said conveyance, Fifteenth street was laid down as a public street upon the confirmed plan of the city. It appears to have been originally laid out under the act of 1808, as a highway on the plan of the district of Moyamensing, across the premises of plaintiff at some time prior to the year 1835. In 1840, a plan showing the grades and watercourses on said street and the vicinity was confirmed by the Court of Quarter Sessions. In 1848, under proceedings in the said court, the said street was declared to be opened across the premises in question.

It would appear, that twelve years prior to plaintiff's purchase of this ground, Fifteenth street was a confirmed public highway upon the city plan, of which fact they had not only constructive notice, but actual notice in the deeds by which they acquired title. The proposition that the city may not open streets through the property of a railroad company, held under such circumstances, if carried to its logical result, would prevent the opening of streets across its track at any point within the city limits. We cannot concede such a principle as this, unless it rests upon positive law. We look in vain through the charter of this company for any such authority. Even where their track crosses country roads, they are required "to construct and keep in good repair, good and sufficient passages across the said railroad, so that the passage of carriages, horses, persons and cattle along the said roads shall not be obstructed."

By the first section of the act of March 20, 1845 (P. L. 191, Purdon, p. 845, pl. 42), "it shall not be lawful for any railroad company to block up the passage of any crossings with their locomotives or cars; and if any engineer or other agent of any such railroad company shall obstruct or block up such crossings, he or they shall be subject to a penalty of twenty-five dollars, to be recovered with costs, in the name of the Commonwealth of Pennsylvania, before a justice of the peace; one-half

of such penalty shall be paid to the informer or informers and the remaining half shall be paid into the treasury of the Commonwealth." And by the twelfth section of the General Railroad act, February 19, 1849 (P. L. Purdon, 840, pl. 17), "whenever, in the construction of any road or roads, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the president and directors of the said company so to construct the said road across such established road or way as not to impede the passage or transportation of persons or property along the same."

The most that can be claimed for this company, is the right to cross the streets of the city which intersect their road west of Broad street, under the restriction, contained in their charter, and the acts of assembly above cited. When they purchased the property at Broad and Prime streets, in 1850, for depot purposes, they took it as any other purchaser would have taken it, subject to the opening of streets. Any authority on the part of the company to restrain the city from exercising this right must be found in the charter of the former, or it does not exist. As was observed by Chief Justice Black, in *Commonwealth vs. Erie and North East Railroad Company* (3 Casey, 338), "that which a company is authorized to do by its acts of incorporation, it may do; beyond that all its acts are illegal. And the power must be given in plain words, or by necessary implication. All powers not given in this direct and unmistakable manner are withheld."

There is no contract, express or implied, between the city and the company, by which the former agreed not to open this street. It follows, that such opening would not be in violation of that clause of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

Nor do we see any force in the objection that the opening of Fifteenth street, as proposed, would destroy the franchise of the company. That such opening would be an obstruction to the proper and ordinary working of the railroad, is doubtless true. But it would only be an inconvenience; a serious one, perhaps, but not a destruction of the franchises of the company. And such franchises are held subject to certain rights of the public. One of those rights is that of opening public highways across the track of the railroad, in order that communication between different portions of the city may not be obstructed.

We now come to consider the proceedings under which it is proposed to open this street. It would appear from our records, that attempts have been heretofore made to accomplish this end, which for some reason seem to have been abortive, or abandoned. They are not relied upon now as the basis of the present action. It may be well, however, to refer to these proceedings. In road docket of the Quarter Sessions, No. 17, page 110, we find the report of the jury appointed by the said court, to assess the damages arising from the opening of Schuylkill Sixth, Seventh, and Eighth streets, in which they award, *inter alia*, "To the Philadelphia, Wilmington and Baltimore Railroad Company, for land on Schuylkill Seventh and Eighth streets, from Prime to Tidmarsh (now Carpenter) street, \$7500."

It appears that the said company claimed damages for the opening of the street through their property. There is no evidence, however, of the

payment thereof. This proceeding seems to have been abandoned, or rendered of no validity by the non-payment of the damages. Prior to the act of 1855, all proceedings relating to a street in the city and county of Philadelphia were vacated, and of no effect, by reason of the non-payment of damages in one year from their assessment. *Commonwealth vs. Commissioners*, 2 Wh. 286; *Stewart vs. The County*, 2 B. 350; *City vs. Dyer*, 5 Wright, 469-70.

Next in order of time follows the act of assembly of April 11th, 1862, P. L. 468, in which it is provided, that it shall be the duty of the Court of Common Pleas of the city of Philadelphia within one month from the passage of said act, to appoint commissioners, whose duty it shall be to proceed to view and lay out Fifteenth street, from Carpenter street south to Reed street, said extension to be made, and damages to be assessed and paid, as provided by existing laws. On the 25th day of April, of the same year, a certified copy of this act of assembly was filed in the Court of Common Pleas, and on the 3d day of May, following, three commissioners were appointed by that court in pursuance of the requirements of said act. The report of said commissioners appears by the record to have been filed on May 17th, 1864. Under this proceeding, there seems not to have been any assessment of damages.

Next follows a resolution of the select and common councils of the city of Philadelphia, approved the 12th day of July, 1869, by which the chief commissioner of highways of said city was authorized and directed to notify, on or before January 1st, 1872, the owner or owners of property along and over which Fifteenth street, from Carpenter to Washington avenue will pass, that three months from the day aforesaid, that portion of said street would be required for public use. On the 29th day of December, 1871, the notice referred to in said ordinance was given by the chief commissioner of highways to the said plaintiff. It is under said notice that the city now proposes to open this street.

It is conceded, that the damages have not been assessed nor paid. The city, however, tenders security for any damages which may hereafter be assessed; and it appears to the court, that councils have authorized the mayor to pledge the credit of the city for that purpose.

It is clear, that Fifteenth street cannot now be opened under the act of 1858, for the reason that the damages have neither been assessed nor paid, nor secured to be paid according to law; nor under the act of 1864, for the reason that there has been no assessment of damages by a jury, and therefore no confirmation of their report by the court. But we think that under the act of 1855, upon the entry of security, the city may proceed and open the street. See *Sower vs. The City*, 11 Casey, 231; *Large vs. The City*, id.; *Spring Garden street*, 7 Phila. R. 393; *Heyl vs. The City*, Legal Intelligencer, 1872, p. 317.

Of the wisdom of opening the street through the Baltimore railroad depot, we express no opinion. Upon such question the action of councils is conclusive. That it will involve the city in a considerable amount of damages seems highly probable. That it will seriously embarrass the operation of a leading line of railroad, and create a highway that can only be used at the peril of life and limb, is equally probable. While the claim of the railroad to prevent, as a matter of right,

the city from opening this street cannot be maintained as a proposition of law, it will remain for the city authorities to determine whether, as a matter of policy, it is wise to cut one of the great arteries which supply the city with its commercial blood.

Upon the entering of satisfactory security by the city, we will refuse this motion and dissolve the injunction.

Henry S. Hagert, Esq., City Solicitor Collis, and William Henry Rawls, Esq., for the city.

Thomas Hart and J. E. Gowen, Esqs., for railroad company.

Quarter Sessions, Philadelphia.

[Leg. Int., Vol. 29, p. 149.]

COMMONWEALTH *ex rel.* DENNIS SHEA *et als.* vs. WILLIAM R. LEEDS,
SHERIFF.

It is a conspiracy for two or more parties to act in concert in unlawful measures to enforce the Sunday liquor law, as by inducing a tavern-keeper to furnish beer on Sunday, by artifice or persuasion.

The mere admission of visitors into a tavern on Sunday is not an infraction of the Sunday law, unless liquor is actually sold.

Opinion delivered May 4, 1872, by

PAXSON, J.—This case was heard upon *habeas corpus*. The relators, Dennis Shea, Frank N. Tully and Charles Hooltka, were charged with conspiracy by one G. A. Barthoulott. The latter keeps a drinking saloon, and it is alleged that the relators were engaged with others in a series of prosecutions against liquor dealers for violation of what is known as the Sunday liquor law. The facts of this case, as they appeared at the hearing upon the writ of *habeas corpus*, were substantially as follows:

One Sunday, the 24th of March last, the relators, Shea and Tully, called at the house of the prosecutor. The front door, window and back entry were closed, but they obtained admission through a private entrance. There was no one in the bar-room when they entered but the prosecutor and one of his boarders. They asked the prosecutor for beer. He refused them, saying, "I don't sell beer on Sunday." After some persuasion, and being told by Shea that a friend of his (the prosecutor) had told them if they would call there they could get some beer, the prosecutor gave Shea and Tully two glasses of beer, repeating, however, his former declaration, that he could not sell beer on Sunday. They then each took a piece of bread and wanted to pay for that; but this, also, was declined, and the prosecutor finally ordered them out of his place. Up to this point he did not know the relators.

On the 13th of April suit was commenced against Barthoulott, before Alderman Jennings, upon complaint of one David Evans, who styles himself the "Treasurer of the Tax-payers' Union," to recover the penalty of \$50 imposed by section 2 of act of February 26, 1855, upon all persons, who shall "sell, trade or barter any spirituous or malt liquors, wine or cider, on the first day of the week, commonly called Sunday." At the hearing Shea and Tully were examined as witnesses. The alderman dismissed the case. It further appeared that, after the above suit was commenced before the alderman, the said Evans stated to Mrs. Barthoulott, that if her husband would pay him \$52.50, the suit would be discontinued and no criminal prosecution commenced.

There was also evidence that this was but one of a large number of suits before the same alderman for alleged violation of the law referred to. All of these suits were commenced upon complaint of the aforesaid David Evans, upon information furnished by these relators.

In some of them there were offers to settle upon payment of penalty, with costs, to Mr. Evans, and one at least of the defendants testified that he had so settled with Mr. Evans, the latter agreeing to abandon any criminal prosecution.

For the relators it was urged that they were engaged in a lawful object, to wit, the enforcement of the Sunday liquor law. If this was in truth their object, it was certainly a lawful one, and worthy of all commendation. Assuming such to have been their purpose, did they resort to any unlawful means to accomplish it? If they did, and if they acted in concert in pursuance of a common design, there was a conspiracy. It was never intended that a man should violate the law in order to vindicate the law.

I am of the opinion that these relators, in their anxiety to procure evidence against Mr. Barthoult, went a step too far. He was not engaged in any violation of law when they entered his place. They urged and persuaded him to furnish the beer; in fact they resorted to artifice and deception for that purpose. If any crime was committed, they were present, aiding and abetting.

It was urged in extenuation of the conduct of the relators that their action was entirely in accordance with the practice in the detective service not only of the police, but in other departments of the government. This is not my understanding of the detective service. I have never known an instance of detectives deliberately procuring a man to commit a crime in order to lodge information against him. Such informers have been infamous from the time of Titus Oates.

We can have no sympathy with the men who sell liquor on Sunday in defiance of law. That there is a class of persons who habitually and insolently defy the law is a reproach to all who are charged with the prosecution of such offences. It is the duty of every good citizen to aid in the suppression of this Sunday traffic. The evils which flow from it are beyond all computation in dollars, and are felt and seen by every citizen. And I have no hesitation in saying, that few persons are more deeply interested in enforcing this law than those who are legitimately engaged in the liquor business. There is nothing which has done more to arouse an antagonism to the whole system than the spectacle witnessed every Sabbath, of drunken men reeling upon our streets.

I am aware of the difficulty of procuring testimony against this class of offenders. It is believed, however, that with proper vigilance on the part of the police, and a hearty co-operation on the part of all good citizens, the selling of liquor on Sunday cannot be carried on to any great extent. Be this as it may, the resort to such means as the Commonwealth alleges were employed in this case is more than questionable. The law does not sanction it, and no solid moral reform will be promoted by it. It is quite possible that when the relators come to be heard in their defence, they may show an entirely different state of facts from those above stated. What I have said is based upon the facts as they now appear. The relators will have an ample opportunity of vindicating themselves before a jury, and for that purpose they are remanded.

[Leg. Int., Vol. 29, p. 149.]

COMMONWEALTH *ex rel.* AMOS BARNES *et als.* vs. THE LADY SUPER-INTENDENT AND MANAGERS OF THE ST. JOHN'S ORPHAN ASYLUM.

Where a mother after the death of her husband, has placed her children under the charge of an orphan asylum, duly authorized to receive such children, upon her death their relatives have no right to interfere where there is no failure of duty on the part of the orphan asylum.

Opinion delivered May 4, 1872, by

PAXSON, J.—This writ was sued out for the relators by their grandmother, who claims to be entitled to their custody. The latter are orphan children, and came to this city from North Carolina, with their parents five or six years ago. Their father died soon after their arrival here, and their mother, not having the means to support and educate her children properly, committed them to the care of the respondents, where they have remained until the present time. Their mother died a few months ago, whereupon this proceeding was instituted to take the children from the respondents and place them with their relatives. The grandmother, who makes this application, has no means beyond a pension of \$40 per year, but she alleges that her two married daughters are willing to assist her in taking care of the children. The husbands of these ladies are in quite moderate circumstances, with families to support—one of them of eight children, the other of four. Their wives do not appear to have any separate estate, and the husbands did not appear in court to express their willingness to aid in support of the children. It is hardly necessary to say that they are not bound by any declaration of their wives. It would seem, therefore, that however commendable it may be for their relatives to desire to provide these minors with a home, they are not in a position to offer them any superior advantages to those which they now enjoy.

The respondents make return to the writ of *habeas corpus*, that the children referred to were admitted to the asylum, free of charge, in the year 1868, on the application of their mother, Margaret Barnes, their father then being dead, to be supported and bound according to the provisions of the charter of the said asylum, as also the covenants executed by the mother.

The charter of the St. John's Orphan Asylum was allowed by the Supreme Court of this Commonwealth on the 26th day of December, 1834, and letters patent was issued by the governor on the 16th of January, 1834. Subsequently the charter was confirmed by act of assembly of 22d of April, 1846. By act of 16th of April, 1862, it is made lawful for any judge, mayor, alderman, or any justice of the peace of the city of Philadelphia, to indenture, bind or commit to the St. John's Orphan Asylum, located in the city of Philadelphia, orphans, destitute, abandoned, or vagrant children. The object of the said corporation, as set forth in its charter, is "the relief of destitute orphan children." By article XI. of their charter, the board of managers "are hereby empowered to receive any orphan child or children, and such other children as may be deprived of one of their parents, to be bound to such person or persons and in such manner as the board may direct," etc. Article XV. of the by-laws of the said corporation contains the following provisions for the binding out of children, viz.:

1. When any child is bound out, it shall be by indenture until he is twenty-one years of age; and with the express proviso, that the special committee on visiting apprentices shall be permitted to visit him, when and as often as they may deem it necessary.

2. The person to whom any child is bound as an apprentice, shall not have the power to transfer or assign his indenture, without the consent of the board. He shall give the apprentice at least six quarters day-schooling during the term of his apprenticeship, and at the end thereof two complete suits of clothes—one of which to be new, and twenty-five dollars in money; and shall then produce him before the committee on children, and satisfy them that the terms of indenture have been complied with.

3. In case the committee become satisfied that any child bound out is subject to harsh and improper treatment on the part of his master or mistress, it shall be their duty to report the same to the board, who shall take action thereon; and if such charges be sustained, shall take all proper means to have the indenture cancelled, and the child returned to the guardians of the institution.

These regulations do not conflict with any law of this Commonwealth, in regard to master and apprentice. The act of 13th June, 1836, section 8, authorizes the binding out of minors as apprentices with the consent of his or her parent, guardian or next friend, until said minor shall arrive at the age of twenty-one, if a male, and eighteen if a female. In case of the death of the father, the mother is competent to bind out her minor child. 6 S. & R. 140; 1 R. 195. And if the husband be an habitual drunkard the consent of the wife alone is sufficient. 1 Ash. 71.

In this case upon the death of the father the whole custody and control of these children devolved upon their mother. For reasons which were no doubt satisfactory to herself, she placed them with the respondents. By a solemn instrument under her hand and seal, she stipulated that she did "surrender and yield up the said children to the St. John's Orphan Asylum, to be provided for, instructed and bound out, by the said corporation, to such person or persons, and for such term of years, within lawful age, as to them shall seem proper." The said agreement contained a further clause that she would not demand or receive any compensation for the services of the said minors during their minority, or interfere in any way whatever with the views or directions of the said corporation in their behalf.

This agreement was not in violation of any rule of law or public policy. It was made with a corporation created by law for the express purpose of receiving and providing for just such children as these. The act of the mother was a clear abandonment of her children. That a parent may abandon his or her child, is too well settled to need argument. The law upon this subject was well considered and discussed in *Comth. vs. Gilkeson*, 10 L. J., p. 505, and this case is of especial value, for the reason that it was carried up and affirmed by the Supreme Court. In *Comth. ex rel. Terry vs. Dougherty*, 1 Legal Gazette R., p. 64, this court held:

1. A parent may relinquish the care, custody and control of his child, and after having done so, his right to claim such child is gone, and will not be enforced by the court.

2. Such relinquishment by a parent of a child may be either by deed or other instrument of writing; or, it may be by parol; or, by abandonment, by turning him out of the house, or permitting him to go upon his own resources; and such relinquishment or abandonment may be presumed from the act of the parent.

3. When the right of the parent is not clear, the court will regard the interest of the child, and when of sufficient age the wishes of the child will be consulted.

The mother by an unequivocal act abandoned her children; it was out of her power during her lifetime, to have resumed their custody against the will of the respondents, unless upon the failure of the latter to perform their duties to said children. Have the mother's relatives, after her death, the right to interfere, and set aside the agreement made with the former? That they might successfully invoke the aid of the court for such purpose is perhaps clear in a case where there was a failure of duty on the part of the corporation to the child committed to its care. But there is no such allegation here. There is nothing to show either that the children are not satisfied, that they are not treated kindly, or that they are not receiving every advantage of care and instruction proper for their condition. On the contrary, their appearance would seem to indicate that they are well provided for, and comfortable and happy in their home.

Nor do I think the allegation that the relatives of the children are of a different religious persuasion from respondents is material to this issue. Their mother was a Catholic, and she placed them in an institution where the same faith was taught which she believed. No one would have questioned her right to do this whilst she was living, why shall it be questioned now that she is in her grave?

It is also to be observed that for several years prior to the death of the mother no aid was proffered by the relatives to enable her to provide a home for her children. We do not look with much favor upon applications for the custody of children, made by relatives, who have laid by during the tender years of such children and come forward with their claim at a time when they may be made useful, and perhaps earn their support.

The respondents express no desire to retain these children, unless the law is clearly with them. They allege that in many instances they voluntarily return children to their parents or friends when the best interests of the former require it. In this case the relatives have failed to show us any sufficient reason why we should disturb the arrangement made by the mother for the care of these children, and they are accordingly remanded to the custody of the respondents.

O. P. Corrigan, Esq., for relators.

Hon. Benjamin Harris Brewster for St. John's Orphan Asylum.

[Leg. Int., Vol. 29, p. 293.]

COMMONWEALTH vs. ALDERMAN HAGAN.

An alderman, taking other or greater fees than are allowed by the fee bill, is guilty of an indictable offence.

Quære,—Whether a defendant in a criminal case can be compelled to pay any costs, unless upon final judgment.

Opinion delivered September 7, 1872, by

FINLETTER, J.—Complaints of the rapacity of the local magistrates have come down to us, continuously, from the earliest periods. Its history is written in the statutes which were mainly intended to punish and suppress it. Its portraiture is found in the current literature of the times. "Shallow" and "Dogberry," and the Justice of Fielding, himself a magistrate, are photographs of living actors of the past and present.

The common law abhorred it, and its condemnation is dotted all along the highway of judicial decision, in indignant language like the following: "It cannot be overlooked that writers on the common law consider extortion as more heinous than robbery itself, attended as it usually is with the aggravated sin of perjury." Speaking of the illegal fees of justices, the judge says, "which we have such loud complaints of everywhere." Duncan, 13 S. R. 429 and 430. "There was a very general belief that the magistrates were in the habit of taking much greater fees than the law allowed them." Rogers, J., *Coates vs. Wallace*, 17 S. & R. 75.

Seventeen years later upon the same subject, he says: "Whether the law as it now stands will prevent these extortions, of which such frequent and just complaints are made, is not for us to say." 17 S. R. 80.

Even now there is an association of a large proportion of the ablest and most reputable members of our bar to suppress this and kindred evils.

It would be unjust to say that the whole fraternity is corrupt. There are many honest and capable magistrates, who could not be tempted to violate their oaths of office. There are, however, many who regard the sacred trusts confided to them only as the means by which they can plunder the poor and defenceless with impunity. To such men the rights of property, the sacredness of the person, individual freedom and character, are meaningless terms, or are made the instruments by which the plunder is extorted.

I have been induced to make these remarks to show the importance of the subject; the necessity of clearly defining the fees, and of holding to strict accountability every infraction of the law in this respect. But the case of the defendant must stand upon its own merits. I shall endeavor to adjudge his cause as if it were the first of the kind known to history, judicial or otherwise.

On the sixth day of July, 1872, Mrs. Brandoff was arrested and a hearing was had before the defendant, who required her to enter security for her appearance at court. A commitment was issued, and she was given in charge of the constable, who went with her until bail was procured. The alderman accepted the bail, and charged and received

\$2.50 as costs. There was no bill of items; and no mention of items. On the 30th of July, the defendant, in answer to a demand of counsel, sent him a bill of particulars, which is as follows:

Commonwealth vs. Olivia Brandoff, assault and battery. Alderman's costs by defendant:

Mittimus and seal.....	75
Recognizance and seal.....	55
Discharge to jailer and seal.....	60
	<hr/>
	\$1 90
Constable's fees taking body on mittimus.....	1 00
	<hr/>
	\$2 90
Costs.....	<hr/>
	\$2 90
Paid to defendant.....	2 50
	<hr/>
Due alderman.....	40

The practice of making a single charge is not to be commended. It gives no opportunity of testing its validity, and may be the means of great abuse. It affords the corrupt magistrate, when he is called to account, an opportunity to manufacture a bill of items to suit the charge made. How can the citizen, who is required to pay a single sum, have any idea of its legality? How can he be expected to denounce its illegality to the man who makes it the price of his liberty? In 8 Watts, 165, Judge Rogers says: "It is impracticable for men to protect rights which they do not understand, and which it is difficult for them to comprehend. And perhaps, also, it might prove some restraint upon officers to compel them, under a penalty, to give a bill of particulars in all cases, whether required or not."

The counsel for defendant argued before me that we must assume that the items of the bill rendered were correct, as to the services therein mentioned; and also that all the services which the alderman might have performed, he did perform. If he had rendered a bill of items, or had named the items at the time he charged and received the sum of \$2.50, there might have been some force in the argument. But to permit him to make the bill of items to suit the gross charge would be to suffer him to make the evidence to suit the complaint. To assume that all services were rendered, which might have been rendered, would be to sanction charges for services not performed. In either case conviction would seldom follow the most flagrant violations of duty.

The true criterion when a single charge is made is to hold that it is made for the service at that time rendered, unless it otherwise appears in the evidence. Upon the hearing I thus notified the defendant, and gave him the opportunity to produce his record. In answer to this he furnished what he called his "blotter." It does not show that a supersedeas was issued. Upon examination of the bill of costs which the alderman furnished it will be seen that he could not make the items suit the sum he charged and received. Strike out a single item and there stands an overcharge confessed.

I have looked with great care for a legal sanction for compelling a defendant to pay costs, unless upon the final judgment of a court of competent jurisdiction. Upon such a judgment the practice prior to

1791 had been to charge the costs upon the defendant, whether convicted or acquitted.

The act of 1791 would seem to have been designed to correct the abuse of compelling innocent persons falsely accused to pay the costs of the magistrate. The act of 1797 freed the acquitted from all costs accruing on bills of indictment. In both cases the costs were to be paid by the county.

These are the only acts that I have been able to find directing by whom the costs shall be paid. They seem to indicate that the costs of prosecution in all cases of acquittal should be paid by the county. The act of 1805, in cases of misdemeanor, gave the jury the right to dispose of the costs at their discretion.

Blackstone, vol. II., p. 36, says: "Officers have a right to exercise a public employment, and to take the fees and emoluments thereunto belonging, as those of magistrates."

In *County of Franklin vs. Commonwealth*, 12 Casey, 318, Woodward, C. J., says: "The recovery and payment of costs in criminal cases is so entirely dependent on statutory regulations in Pennsylvania that it is indispensable for every claimant to be able to point to the statute which entitles him to recover what he claims."

"A magistrate in binding over a defendant in a criminal action has no right to take from him any fees beyond those for the recognizance and the commitment and supersedeas; and then only if such services be actually performed." King, P. J., 5 P. L. J., 457.

This would seem to indicate that a magistrate had a right to charge a defendant for the services mentioned. No one can entertain a higher respect and reverence for Judge King than I do. It will be observed, however, that the question before him was not as to the legality of these charges, but as to the charges beyond them.

As the inference might fairly be drawn from Judge King's decision that the alderman had a right to charge the defendant for the commitment and recognizance, I will give him the benefit of this doctrine. His "blotter" shows only a commitment and recognizance.

For these services he had a right to charge as follows:

For the commitment and seal.....	75
For the recognizance.....	30

The charges for the seal upon the recognizance was illegal. That was not his act. It was the act of the defendant and his surety. When, however, the alderman certifies for any purpose that the recognizance has been entered into, he may charge for such certificate. There is no authority for the alderman to receive the fees of the constable. The only charges the alderman could make as inferable from Judge King's decision are as follows:

For the commitment.....	50
For the seal thereon.....	25
For the recognizance.....	30

\$1 05

He charged \$2.50. Let us see if this be an offence known to the law.

In a work supposed to have been written before the Conquest it is said: "It is abuse that prisoners, or others for them, pay anything for

their entries into the gaol, or for their coming out." Horne's Mirror, p. 231, ed. 1762.

"By the statute of 3 Ed. 1, c. 16, in affirmance of the ancient law, it is enacted that no sheriff nor other king's officer shall take any reward to do his office, but shall be paid of that which they take of the king, and that he who so doeth shall yield twice as much, and shall be punishable at the king's pleasure. This act which thus particularly names the sheriff, extends to every ministerial officer concerned in the administration or execution of justice, the common good of the subject, or the service of the king." 2 Inst., 209.

This statute is made in affirmance of a fundamental maxim of the common law, which is *non capiant vice comites vel alii ministri regis praemium vel mercandem, vel aliquid pro officio suo facundo sed tantum de frodis suis domino rege sint contenti*.

Capitulum justitiae in Magna Charta, fol. 155, article 9, treats of sheriffs and others, bailiffs and ministers of the king, taking gifts or reward for executing their offices. Subsequent statutes gave fees in some cases, and thenceforth the exactions of corrupt officers were called by them fees.

"Extortion was a high misdemeanor at common law, and punishable by imprisonment and fine, but the statute added the aforesaid penalty (double for failure, etc.) But some later statutes having permitted them to take in some cases by color thereof, the king's officers and members do offend us with cases; and seeing this act yet standeth in force they cannot take anything but where and so far as later statutes have allowed unto them. All this was resolved by the whole court of King's Bench, between *Sharley*, plaintiff, and *Packer*, deputy of one of the sheriffs of London." Co. Litt. 368, b.

Extortion is an abuse of public justice; which consists in any officer unlawfully taking by color of his office from any man any money or thing of value that is not due to him or more than is due or before it is due. 1 Hawkins, Pleas of the Crown, 170; Co. Litt., 368, b.; 4 Blackstone, 137.

"When a statute annexes a fee to an office it will be extortion to take more than it specifies." 2 Inst., 210.

No custom or practice, however ancient and continuous, will justify a charge not recognized by statute. As early as the reign of Elizabeth it was held that "All prescriptions contrary to the act, 3 Edw. I. c. 16, are void, so that when the clerk of the market claimed fees incident to his situation, which had been attached to it from time immemorial, his perquisites were defeated." Moore, 523.

The doctrine is recognized and established by the laws of this State by Chief Justice Woodward, in 2 Casey.

The taking of illegal fees was indictable in this State at common law, until the passage of the act of 1814, which gives a penalty to the party injured. In *Comth. vs. Evans*, 13 S. R. 426, it was held "that an indictment cannot be sustained against a justice of the peace for taking excessive or illegal fees, since the act of 1814, which gives a penalty to the party injured. The only remedy is to recover the penalty."

The act of March 25, 1831, re-enacted the provisions of the common law. The act of 1860 modified the act of 1831 and the common law, by

taking away the criminality from the taking of fees before the services were rendered, but left the law the same in all other respects. It is as follows :

"If any justice, etc., shall wilfully and fraudulently receive or take any reward or fee to execute and do his duty and office but such as is or shall be allowed by some act of assembly of this Commonwealth, or shall receive or take by color of his office any fee or reward whatever not or more than is allowed as aforesaid, he shall be deemed guilty of a misdemeanor in office."

It will be observed that the taking must be wilful and fraudulent.

It must be wilful. He must design to charge and take the fee. If the sum taken illegally were the result of mistake, as error in the additions of items, he could not be said to have taken it wilfully. Where, however, he demands a specified sum and receives it, can there be any doubt that he does so wilfully?

The taking must be also fraudulent. Every man in law is held accountable for the natural consequence of his wilful act. Whenever a citizen is compelled to pay an illegal fee a fraud is perpetrated upon him under cover of law. Until the contrary appear he who demands and receives the fruits of that fraud will be presumed to have acted fraudulently.

Again the demand of such fees is a representation that they are legal. This is a wilful misrepresentation by the alderman, because he is presumed to know what the legal fees are in all cases.

The motives and intent of the alderman are questions to be determined by the jury from all the facts and circumstances of the case. For the present inquiry it is enough for me to say that under the facts and law of this case I would not direct a jury to acquit.

The characteristic force of Judge Gibson has lent a charm to this subject, and compels conviction. In 17 S. & R., p. 81, he says:

"Nothing is more liable to abuse than the right which the law gives to compensation for official services. Nothing requires to be more strictly guarded. To allow compensation for services which cost no trouble, having been rendered theoretically, would be palpably unjust.

"Ignorance of the law will not excuse in any case, and this principle is applicable, and with irresistible force, to the case of an officer selected for his capacity, and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient show of intelligence to enable the party to follow a guide provided for him with an unusual attention to clearness and precision. On any other principle a conviction would seldom take place, even in cases of the most flagrant abuse, for pretexts would never be wanting. Sound policy, therefore, requires that the officer should be held to act at his peril."

The views herein expressed are my individual opinions. I have not had an opportunity of conferring with my brethren. If I am in error it will give me pleasure to be corrected.

The defendant is required to enter security in the sum of \$1000 for his appearance to answer at the next Court of Quarter Sessions.

[Leg. Int., Vol. 29, p. 341.]

PASSMORE *et al.* vs. PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY.

A jury may award damages to a tenant for life as well as to a trustee of the fee in remainder.

The tenant for life is entitled to claim damages without the intervention of the trustee of the remainder.

Opinion delivered *October 19, 1872*, by

PAXSON, J.—This case came up upon exceptions filed on behalf of James McIlvaine, trustee, to the report of the jury appointed by this court to assess damages, and also upon a rule to show cause why the appeal entered by said James McIlvaine, trustee, from the award of said jury should not be quashed.

The defendants, in the construction of their road from this city to Chester, have taken a portion of the property now occupied by John L. Passmore, near Darby. The amount taken was something over two acres. In constructing the road, an embankment about forty feet high has been placed within a few feet of the mansion house, cutting off the view of the barn, and the passage-way thereto, except by means of a tunnel under the railroad. The property is valuable, has a considerable quantity of land attached, with large and handsome improvements, and prior to the building of the railroad was a desirable and attractive country seat. Under the will of Levis Passmore, the said John L. Passmore has an estate for life in the said premises, with remainder to his children, with a contingent remainder over to his sisters' children in case of failure of issue on his part. The said James McIlvaine is trustee of the property under the said will, but as such trustee is not charged with any active duties, the said Passmore having the right to use and enjoy the said property, and to take and receive the rents, income and profits thereof.

Subsequently to the appointment of the jury to assess damages for the taking of the land, this court made an order directing that the damages of the tenant for life be assessed separately from those assessed to the remaindermen. The jury have filed their report awarding to the said John L. Passmore (tenant for life) the sum of \$13,000, and to the said James McIlvaine, trustee for the remaindermen, the sum of \$1166.66, for injuries to the reversion. It is to this report the exceptions referred to have been filed.

The exceptions are numerous, but they raise substantially but two questions, viz :

1st. Whether the damages awarded to the remaindermen are sufficient; and,

2d. Whether the tenant for life is entitled to claim damages, without the intervention of the trustee for the contingent remainder.

Upon the first point there was nothing said upon the argument, nor is there anything before the court sufficient to shake the finding of a jury. The amount is not large, it is true, but the jury may have considered the probable enhancement in value of the land not taken, as a part compensation for the damage to those in remainder. If they were wrong in this, we at least have nothing before us which enables us to say so, and

we cannot grope in the dark for conclusions for the purpose of overturning the judgment of the tribunal especially designated by law for the determination of this very question.

In regard to the second point, it was contended with great force and ability by the learned counsel for the trustee, that the damages awarded to the tenant for life, should have been awarded to the trustee for the remaindermen; and that the life tenant was entitled only to the interest of this sum. It was urged that the legal estate was in the trustee, and that as a result thereof, he only could claim for damage to the estate; in support of which a number of authorities were cited. It is not proposed to controvert this law, but we regard it as inapplicable to this case. The damages for the injuries to the estate, that which will pass to the remaindermen, were claimed by and awarded to their trustee. But the latter is not satisfied with this, and claims also the damages awarded to John L. Passmore. Upon what ground? He is not trustee for Mr. Passmore, and might as well claim any other sum of money awarded to the latter by a jury. We deem it entirely immaterial whether Mr. Passmore had a legal or an equitable life estate. The damages awarded to him, we are bound to presume, were for injuries personal to himself. He is entitled to the rental of the property. If this is destroyed or impaired he is entitled to the damages. If his growing crops are destroyed, or improvements which he has made for his own comfort or convenience are taken away, the injury is personal, and the estate of Levis Passmore has no concern therein. There might be such a case as the utter destruction of the beneficial interest of the life tenant, and yet such manifest advantages to the estate as to preclude the jury from giving any damages whatever. If the tenant for life has no right to claim damages, what would be his remedy?

Practically this question is of but little importance, from the fact that the remaindermen, who are all children of Mr. Passmore, have signed a paper which has been submitted to the court, in which they ask that the report of the jury may be confirmed, and disapproving of the course of their trustee. It is true there is a remainder over, contingent upon the death of all of the children without issue during the life of Mr. Passmore. But as the latter is over sixty years of age, and has eight children now living, the chance of this contingent remainder ever vesting is exceedingly small.

The learned counsel of the trustee attached considerable importance to the large amount of the award to Mr. Passmore. We do not see that this concerns any one but the railroad company. They have withdrawn the exceptions filed by them, preferring to pay the amount than to incur the risk and expense of further proceedings. The award seems to us, with the light we have, as a very liberal one. In the absence now of any exceptions by the only party entitled to complain, we are not called upon to decide how much of the sum may be regarded as legitimate damages for injury inflicted, and how much of it was due to the sympathy of the jury for a gentleman in the decline of life, who has had the entire beauty and comfort of a place destroyed, where he had expected to pass the closing years of his life.

It remains but to notice the rule to show cause why the appeal of the trustee should not be quashed. The act of 9th of April, 1856, Purdon,

840, pl. 16, providing for appeals in such cases, requires the appeal to be entered within thirty days after the filing of the report of the jury. In this case the said report was filed on the 13th July, 1872. The appeal was entered on the 13th of August following. This was too late.

The exceptions filed by James McIlvaine, trustee, to the report of the jury are dismissed, and the rule to show cause why the appeal entered by said trustee from the award of said jury should not be quashed, is made absolute.

M. Hampton Todd, Esq., for James McIlvaine, trustee.

Thomas Hart, Jr., Esq., for Philadelphia, Wilmington and Baltimore Railroad Company.

Hon. A. V. Parsons, for John L. Passmore.

[*Leg. Int.*, Vol. 29, p. 348.]

COMMONWEALTH *ex rel.* JAMES D. BARTLETT *vs.* SUPERINTENDENT
OF THE PHILADELPHIA COUNTY PRISON.

A defendant is not liable for larceny as bailee for failing to account, he having agreed to conduct a business, pay expenses and divide the net profits with the prosecutor. The prosecutor's remedy is a civil action.

Opinion delivered *October 26, 1872*, by

PAXSON, J.—The relator in this case is charged with larceny as bailee, and seeks to be discharged upon habeas corpus. It was alleged on behalf of the Commonwealth that for some time past he has been master of a coasting vessel, under an agreement with the owner to sail said vessel, collect the freights, pay all expenses, and divide the net profits with said owner. That in pursuance of said arrangement the master received a considerable amount of freight which he has not accounted for; that upon his return from his last voyage he abandoned said vessel; that the owner is unable to obtain any settlement with him. It was not shown that the relator had received any specific sum of money belonging to the prosecutor which he has failed to pay over; the evidence went no further than to show a failure to account. There was, indeed, proof of the possession by the relator of money upon one or two occasions, but the amount was not shown, and it was accompanied by declarations of the latter that it had been lost; nor did it appear whether the sums referred to were gross receipts or profits after the payment of expenses.

It is perhaps unnecessary to consider the question of partnership raised upon the hearing. It is clear the relator was to participate in the profits, which involved necessarily an adjustment of accounts between the parties. The 107th section of the criminal code, providing for the case of larceny by a "clerk, servant, or other person in the employ of another," was not intended to apply to the case of a disputed account, but rather to instances in which the clerk, servant, or person employed, receives the money of his principal or employer, and has no duty to perform other than that of paying over the same to said principal or employer. Here, there must be a settlement of accounts between the relator and the prosecutor, in order to ascertain the profits, if any. The prosecutor is not entitled to any specific sum of money until this is done, and if the ship has not made any profits, he has no right to call upon the relator for anything excepting an account. This case belongs to the civil side of

the court. That the relator is irresponsible pecuniarily, as has been alleged, does not affect the case. That is a matter for parties to consider when they enter into a contract.

Let the relator be discharged.

Messrs. Dickerson, Vanarsdalen and Cornman, for relator.

J. Warren Coulston, Esq., for prosecutor.

[Leg. Int., Vol. 29, p. 364.]

COMMONWEALTH vs. WOHLGEMUTH et al.

An indictment need not conform precisely to the phraseology of the alderman, provided the offence charged is the same—the details are for the pleader.

Opinion delivered November 9, 1872, by

PAXSON, J.—The defendants were bound over by Alderman Bonsall, to answer the charge of conspiring to annoy, disgrace and imprison one **Ellen Blakeley**.

The indictment found by the grand jury against the defendants contains two counts. In the first it is alleged, that the husband of the said Ellen Blakeley was a convict in the penitentiary, and that the defendants conspired to induce her to give them money to procure a pardon, one of the defendants representing himself as a State Senator, and possessed of great influence at Harrisburg, and that in pursuance of said conspiracy, they obtained a certain amount of money from Mrs. Blakeley, with the intent to cheat and defraud her.

The second count charges a conspiracy to cause the arrest and imprisonment of the said Ellen Blakeley, by color of legal proceedings, setting out various overt acts in support of said charge.

The defendants demur to the bill of indictment, and also move to quash the same, in support of which the following reasons have been filed, viz.:

1st. The said indictment charges other offences than the one the defendants were bound over to answer.

2d. The defendants in the said indictment are charged with several different crimes for which they have not been bound over to answer. And,

3d. That the various offences named in the bill of indictment were not given in charge to the grand jury by the court, or sent to the grand jury by the district attorney, on his official responsibility, nor have they been made the subject of presentment by the grand jury.

The learned counsel for the defendants relies upon *Commonwealth vs. Simons*, 6 Phil. R. 167, to sustain this motion. Of the soundness of the views expressed by my brother Allison in that case, there cannot be a question. I agree entirely with the defendants' counsel as to the law; I differ from him only in the application of the law to the facts of this case. In *Commonwealth vs. Simons*, before cited, the defendants had been bound over for obtaining money by means of false pretences. The indictment charges them not only with this offence, but also contained other counts charging them with embezzlement and conspiracy, which latter charges were not made before the committing magistrate, and as to which the defendants never had a preliminary hearing.

In this case, the charge before the alderman was conspiracy, and the indictment charges conspiracy and nothing else. It is true, the pleader

does not conform to precisely the phraseology of the alderman in preparing the indictment. Nor is this necessary. The offence is the same; its details are for the pleader. The latter is not bound by the alderman's imperfect description of the offence. If the committing magistrate return a conspiracy, the pleader may not charge a larceny or a murder. But he may allege substantially the same offence in any manner that the rules of pleading or the character of the evidence may require.

The demurrer and the motion to quash are overruled.

R. P. White, Esq., for Commonwealth.

Charles H. Sidebotham, Esq., for the defendants.

[*Leg. Int.*, Vol. 29, p. 380.]

COMMONWEALTH vs. HUGH MORROW.

1. A juror is qualified to act who states he will try the case impartially upon the evidence and that alone.
2. Evidence will not be admitted of other transactions occurring some time before and having no connection with the issue.
3. The practice as to inflicting the penalty provided by the statute for the second offence discussed.

Opinion delivered *November 23, 1872*, by

PAXSON, J.—The prisoner having been convicted of an assault with intent to murder Alderman William McMullin, moves the court for a rule for a new trial, in support of which motion his learned counsel assign the following reasons:

1st. Because the court erred in overruling the defendant's challenge for cause in the case of Henry Roberts, a juror, who had formed and expressed an opinion as to the guilt or innocence of the defendant.

2d. Because the court erred in overruling defendant's offer to prove that the defendant, when a fugitive from justice, was secreted by the prosecutor in his house for two weeks.

3d. Because of the insanity of Robert Douglass, a juror who sat upon the case.

4th. Because the verdict was against the law.

5th. Because the verdict was against the evidence.

The juror referred to in the first reason was examined touching his qualifications to sit as a juror. He stated distinctly that he could try the case impartially, upon the evidence and that alone, entirely uninfluenced by any opinion previously formed. This brought the case within the ruling of this court in *Commonwealth vs. Probst*, in which the same point was distinctly raised, and an application made to the Supreme Court for a writ of error, which was refused. A contrary doctrine would exclude from the jury box, in all cases of great public importance, the most intelligent class of jurors—those who read the papers, and receive therefrom, impressions as to passing events. We may consider this question at rest.

It is sufficient to say, in answer to the second point, that the previous relations between the prisoner and Alderman McMullin were evidence only so far as they bore directly upon the question of the shooting. The case was tried, as we endeavor to try all cases, upon the law and the evidence. It was a mere question of assault with intent to murder. To have opened the door to inquiries as to other transactions which occurred

two or three years ago, and which have no connection with the issue upon trial, would have been a violation of the rules of evidence. It might have gratified public curiosity, but that is not the object of judicial proceedings. This point is too plain for discussion.

The third reason alleges insanity on the part of one of the jurors who sat upon the case. This point, if sustained, would be serious. It matters not who Hugh Morrow is, nor what his past career has been. He is entitled to an impartial trial before a competent jury. Upon this point I have considered the affidavits submitted with great care. I do not think they make out the insanity of the juror; nor that they raise such a question of doubt about it as to make it proper for the court to pause for further investigation. The most they establish is, that some months ago the juror had a spell of sickness, which was accompanied with a certain amount of mental disorder.

The witnesses who speak of his condition refer to matters occurring at that time. The most important affidavit was that of a brother of the juror. He says "he (the juror) began to get better four months or more ago. . . . He has no appearance of restlessness now. I think he is all right now, and has been ever since he began to get better." The juror was examined touching his qualifications to serve. There was nothing in his manner or replies then to indicate insanity; nor do I find anything in the affidavits to sustain such a charge.

The fourth and fifth reasons are the usual formal ones, that the verdict was against the law and the evidence. Neither of them is sustained. The case was fully made out, both upon the facts and the law. The shooting was admitted, and the intent to kill was properly inferred by the jury from the nature of the attack and the weapon used.

There is another matter which may be appropriately noticed here. After the verdict of the jury had been rendered, the district attorney offered in evidence to the court the record of the former conviction of the prisoner of an assault with intent to kill James J. Brooks.

There was also proof made of identity. This was for the purpose of enabling the court to impose sentence under the 182d section of the criminal code, which authorizes the court in certain cases of second conviction to impose double the ordinary punishment. Subsequently, the district attorney, in view of the fact that the prisoner had been pardoned by the Governor for his first offence, withdrew his application for sentence under the section referred to. Upon reflection, I do not feel disposed to sentence the prisoner as for a second offence. It is at least questionable, whether it could be done legally in view of the pardon. Without, however, deciding this point, it is sufficient to say, that it would seem to be a harsh administration of the law to visit the prisoner with any of the consequences of an offence for which he has received a full and free pardon from the Governor.

A very interesting question was raised upon the argument of this motion as to the proper practice in cases where it is proposed to inflict the penalty provided by the statute for a second offence. While the exigencies of this case do not require me to decide it, I desire to call the attention of the profession to its importance. The 182d section of the code (Purdon, 247, pl. 191) leaves it optional with the court to impose more than the ordinary punishment in case of a second conviction, yet

murder of the second degree is specially excepted from the operation of this section; and by the 76th section (Purdon, 231, pl. 84), the court is *required*, upon a second conviction for the latter offence, to impose the sentence of imprisonment for life. The question naturally suggests itself, how is the fact of a previous conviction to be judicially ascertained when the court comes to enter judgment for the second offence? This much is clear, that the record of the second conviction must in some way show the first, otherwise there would be nothing to sustain the sentence in case of a certiorari to the Supreme Court. It was alleged by the learned counsel for the prisoner that the indictment for the second offence must set forth the conviction for the first offence. *Smith vs. Commonwealth*, 14 S. & R., would seem to sustain this view. But it is to be noted that in that case the question was not made whether the course pursued was the proper practice. The Commonwealth having assumed to charge the first offence in the second indictment, the court held that everything must be set forth necessary to bring the case within the statute, and that it must appear what *judgment* was given for the first offence.

To allege in a bill of indictment charging a man with a high felony, that he had previously been convicted of a similar offence, would be an anomaly in the administration of the criminal law. It would go very far to secure his conviction. It would settle every question of doubt decisively against him. It would render his evidence of good character of no practical value. That which in other cases is jealously excluded by all the rules of evidence, would be here thrown in with most disastrous consequences to the defendant, at a time, too, when, of all others, he should have a fair trial, as double punishment follows a second conviction.

This is one view of the case. On the other side, if, after the verdict, evidence were offered to the court of the prior conviction, it would consist of, first: the record of said prior conviction; and second, oral evidence as to the identity of the defendant. Here arises the difficulty that the question of identity is purely one of fact. In some cases it might be a very embarrassing and difficult one to decide. A long term of imprisonment might hang upon this question of fact. It would seem only just to the defendant that it should be settled by the verdict of a jury. Indeed, it is a question whether such is not his constitutional right.

I see no way of avoiding these difficulties, but by some proceeding, subsequent to the verdict, when, if an issue of fact be raised, a second jury can pass upon it. Whether this requires additional legislation, or whether it is even necessary in the interests of justice, I leave to others to decide. The views expressed are my own; my colleagues are not bound by them, nor are they in any sense responsible for them.

The rule for a new trial is refused.

District Attorney Mann, for the Commonwealth.

John Goforth, Esq., and *Hon. H. Bucher Swope*, for defendant.

[Leg. Int., Vol. 29, p. 412.]

COMMONWEALTH vs. JAMES KELLY, BAIL OF THOMAS MULHOLLAND.

A pardon and remission of forfeiture procured by fraud are void.

Opinion delivered *December 21, 1872*, by

FINLETTER, J.—On the 23d day of September, 1872, judgment was regularly entered in the above case against James Kelly, the defendant, for \$1500, for want of an affidavit of defence. Same day execution issued.

"October 12, 1872, defendant James Kelly appearing in court and filing the remission of the governor of this Commonwealth, under the great seal of the State, of the above forfeited recognizance, the above execution issued upon the judgment obtained upon the same is stayed, and the judgment thereon opened."

"October 14, 1872. Rule to show cause why the order opening the judgment and staying execution should not be vacated."

"December 2, 1872. Averment of fraud in procuring remission filed by the attorney-general."

We are requested to make the rule to vacate the order of October 12 absolute.

1st. Because it was obtained without notice to the Commonwealth.

2d. The remission was procured by fraud.

It nowhere appears that the Commonwealth had notice, nor is it contended that notice was ever given. The allegation of want of notice is not denied, and is sustained by the order itself.

It is a primary and fundamental principle that no one's right can be legally adjudicated without notice, express or implied. This rule applies as well to the Commonwealth as to any other suitor. It follows, therefore, that the order of the 12th of October was irregularly entered.

The consideration upon which the remission was granted appears upon the instrument itself, and is as follows:

"*And whereas*, from the deposition of George King, Hugh Siner, James Kelly, John White, Edward Bradley, and Sarah Sheridan, it appears that at the time of the arrest Mulholland was somewhat in liquor, and the officer arresting him used unnecessary and undue physical force, which caused the resistance for which he was prosecuted; and it appearing from statements submitted, that Mr. Kelly, actuated by sympathy for a delicate wife and two children, entered security and produced Mulholland in court; but the defendant actuated by fear engendered by threats, made by parties interested in the prosecution, left; and it appearing that Kelly has made every effort to produce Mulholland in court, and that he is a man of moderate means, and will be seriously crippled if compelled to pay the amount of the forfeited recognizance."

The evidence heard upon the rule showed conclusively that the affidavit was a forgery, and was a fraud practised upon the executive. In *Commonwealth vs. Holloway*, 8 Wr. 219, C. J. Lowrie says, "We think also that this pardon is void because of the false and forged representations and papers that were used in procuring it from the gov-

ernor. . . . This question, however, can be raised only at the instance of the attorney-general, as the law officer of the executive."

In the present case the question is raised by the attorney-general, who has appeared for the executive and for the Commonwealth, and by the pleadings and at bar has called upon us to adjudge the remission to be void because of the forgery and fraud by which it was procured. We can have no hesitation in pronouncing it void, as the evidence leaves no doubt of the forgery and fraud.

It has, however, been argued that this is not the proper proceeding or the proper time in which to question the validity of the remission. It was not shown that any particular mode is required by law or practice.

In *Commonwealth vs. Holloway* several methods are suggested, but they are not said to be the only ones. Ordinarily, whenever a deed or grant of any kind is pleaded or given in evidence, it may be objected to for any legal reason.

Whatever vitiates it, whatever destroys its effect, whatever may exclude it from consideration, may very well follow wherever it leads. There is no reason to exempt from this liability grants from the executive. He who obtained by fraud such an instrument must expect to meet the legal consequences, whenever and wherever he attempts to profit by the fraud. In law fraud is the finger of death to everything it touches.

Rule absolute.

[Leg. Int., Vol. 29, p. 76.]

COMMONWEALTH vs. SHISSLER.

An indictment for fraudulently altering a receipt, that being no averment that it was made to the prejudice of another right, held bad on demurrer.

Charge, fraudulently altering a receipt, and obtaining a receipt by false pretences.

Demurrer to all the counts.

Opinion delivered *February* 14, 1872, by

FINLETTER, J.—The first four counts substantially charge that the defendant fraudulently altered the date of a receipt for \$782. The fifth count alleges that he obtained the signature of the prosecutor to a receipt for work and labor done for \$782, by falsely representing that it was a receipt for \$55 in cash, and for a due bill for the sum of \$727. To all these counts the defendant has demurred specially.

Whether an indictment be at common law, or under a statute, it is always essential that sufficient be averred to indicate that a particular offence has been committed. It should be so fully set forth that it could be effectually pleaded to another indictment for the same offence.

The act of assembly under which the first four counts are framed, requires that the alteration shall be "to the prejudice of another right;" and "with intent to defraud." Under this act it is necessary that the indictment should aver or should show that the alteration was to the prejudice of some one; and should also state how and by what means the prejudice or injury arose; and how and in what manner it was the result of the alteration.

The instrument of writing set out in the indictment is "a certain receipt and acquittance for money given by one Oliver H. Ott." It is manifest that no alteration of such an instrument of writing could be to the prejudice of Oliver H. Ott, unless there was an antecedent indebtedness due from the defendant to him; or some indebtedness upon which the instrument as altered could operate. Unless such was the fact, the prosecutor could have no interest either in the instrument as originally made or altered; the alteration would be an innocuous act.

No alteration of such an instrument could affect the interest of any person until publication or use thereof was made. Perhaps it would be safer to say that no alteration could be said to be fraudulently made to the prejudice of another, until the defendant had in some way made use of the altered instrument.

In *Rice vs. State of Tennessee*, 1 Yeager, p. 433, it was held that an indictment for forging a receipt must charge that the person to whom the receipt purported to be given, was indebted to the person whose name was forged. Judge Peck says, "the first count in the indictment, we are inclined to think, is not sufficient in law, omitting, as it does, to charge any debt due from the defendant to Kelly and Porter. For want of this averment, the receipt may be harmless."

Where an indictment charged that A did feloniously and fraudulently forge a certain writing as follows, "Mr. Bostick, charge A's account to us. B & C," it was held that the indictment was not valid without charging that A was indebted to Bostwick, as there could be no fraud unless a debt existed. *State vs. Humphreys*, 10 Humphreys, 442.

In the *People vs. Wright*, 9 Wendell, 197, upon an indictment for forging a mortgage and receipt, Nelson, J., says: "Again, as to the mortgage, I apprehend the count is entirely defective by not setting forth sufficient to bring the offence within the twenty-second section. That section provides, that every person convicted of having forged, etc., any will, etc., or any deed or other instrument being or purporting to be the act of another, by which any right or interest in real property shall be, or purport to be transferred, conveyed, or in any way charged or affected with intent, etc., shall be punished. Now, although the mortgage which is set out in *haec verba* purports to embrace a part of lot No. 21 in Dryden, yet, for aught appearing in the indictment, there may not be such a lot or tract of land in existence; it may be wholly imaginary, and for that reason its existence ought to have been averred and proved upon the trial in order to show that the instrument purported to be a charge upon the land within the meaning of the section. If it was not, it was wholly inoperative. Neither is it alleged in the count that Shaffer, the mortgagor, whom the prisoner intended to defraud, had any interest in the land the mortgage purported to affect; and if he had not, it is difficult to discover how he could be defrauded. 3 Chitty's Cr. L. 1039. The 45 Geo. 3, 3 Chitty, 794, makes it felony to forge or alter any deed, will, etc., with the intent to defraud any person. In the 3d vol. Chitty's Cr. L. p. 824, 5-6, precedents are given in conformity to the principles above laid down."

Where the statement of the act itself necessarily includes a knowledge of the illegality of the act, no averment of knowledge or bad intent is necessary. Under statutes the distinction has been taken that, where

the guilty knowledge is part of the definition of the offence, it must be averred, but not otherwise. Where a particular intent is necessary to constitute an offence, it must be averred.

The offences charged in all the counts are misdemeanors, and may, therefore, be joined. The well-established rule is, that in misdemeanors the prosecutor may join several distinct offences, and try them at the same time. Even in felonies, where the offences are part of the same act, no election will be compelled.

In *Moore vs. Commonwealth*, 8 Barr, 260, it was held that obtaining a receipt in discharge of a debt, by false representation, is not indictable, because it is not such property or valuable thing as is contemplated by the 21st section of the act of July 12, 1842.

A receipt is not "an instrument of writing" within the act. In cases within the act, the false representation must be *aliunde* the instrument. It is not easy to see upon what principle of law or common-sense the false representation of the contents or substance of an instrument of writing should be indictable. Such instruments in contemplation of law, are supposed to be written by those who signed them. At all events they are supposed to be seen and read by them. A man's belief cannot be affected by a representation which is visibly false. If having eyes, he sees not, the fault is his own.

Tested by the principles herein set forth, all the counts are wanting in material and substantial matters. The demurrer is, therefore, sustained and judgment entered for the defendant.

[Leg. Int., Vol. 29, p. 68.]

COMMONWEALTH *vs.* BAUER.

Entry of forfeiture of recognizance.

Opinion delivered *February* 10, 1872, by

FINLETTER, J.—Rule to show cause why the forfeiture of recognizance in the above case should not be entered of record *nunc pro tunc*.

Rhodes vs. The Commonwealth, 3 Harris, 272, settles beyond controversy that such an entry may and should be allowed when the circumstances warrant it. The difficulty in the present application is, that there is no evidence of the forfeiture.

It has been ably argued for the Commonwealth, that when the term has passed without trial the record should show such reasons as would excuse or prevent a forfeiture of the recognizance. The authorities which have been cited to sustain this doctrine show only that the condition of the recognizance is broken by the non-production of the party defendant. Forfeiture, however, is the judgment of the court upon condition broken, and can be entered only upon proper hearing and adjudication. Such has always been the practice of this court. There being no evidence in the present case that forfeiture was declared and adjudged, the rule is discharged.

[Leg. Int., Vol. 29, p. 341.]

IN RE MERCHANT STREET.

Proceedings to widen a street will be set aside where the petition does not show the grounds of action by board of survey.

Opinion delivered *October 19, 1872*, by

PAXSON, J.—This was a rule to show cause why the order of court appointing the jury to assess damages should not be set aside and the proceedings quashed.

The petition referred to is signed by one G. Schiedt, who styles himself the "President of the Fifth Street Market Company of Philadelphia," and sets forth, "that a petition asking that Merchant street from Fourth to Fifth street may be widened on the south side thereof to forty feet, was submitted to the board of surveyors of said city, and the said board of surveyors have approved the same, and that said company own land on said south side."

The petition further prays for a jury to assess the damages, etc.

This proceeding is evidently based upon the 4th section of the act of 6th of June, 1871, which is as follows:

"That whenever a petition asking for the widening of any street in the city of Philadelphia, shall be signed by a majority of the owners of property, or the owners of a majority of feet front, fronting on one side of said street, and shall be submitted to the board of surveyors of said city, they shall examine into the expediency of granting the petition as asked for; and if approved by them the said street shall be widened on the side on which the property of said petitioners may be located, in accordance with the existing laws relative to the opening of streets in said city of Philadelphia."

Various objections were urged to this proceeding, some of which it is not necessary now to consider. The petition itself is extremely informal. It was no doubt intended as a petition by the Market Company, but it does not say so, except inferentially. But a more fatal defect is the fact that it does not set out the proceedings before the board of surveyors in a way to show that said board had any jurisdiction to act on the petition. It is true there is an allegation that a petition was presented to the board of surveyors, but we are left entirely in the dark as to whose petition it was; whether signed by a majority of the owners of property, or the owners of a majority of feet front on said street; or whether signed by any one having any interest whatever. These omissions are too serious to be passed over, and the rule to set aside the appointment of the jury, and to quash the proceedings is made absolute.

George L. Crawford and William L. Hirst, Esqs., for rule.

Moses Dropsie, Esq., contra.

Cases of Criminal Law and Practice.

[Leg. Int., Vol. 29, p. 13.]

Before Peirce, J.

COMMONWEALTH vs. WILLIAM CONNER.

Plea of autre fois acquit.

The defendant was tried upon an indictment containing three counts, charging: 1st. Larceny of tobacco, cigars and pipes, the property of John Ludy; 2d. Receiving the same knowing them to have been stolen; 3d. Entering the store of the said John Ludy with intent to steal; and the time laid in the indictment was December 2, 1871. The evidence submitted by the Commonwealth disclosed, that on the day mentioned these goods had been taken from Mr. Ludy's store, and also fifty pennies and a bunch of keys; and that the goods were found in a yard where the defendant had secreted himself, and the pennies and keys were discovered on his person; but there was no proof that the store had been entered. Upon this third count the court instructed the jury that, as it was entirely unsupported by evidence, they could not convict. The jury returned a verdict of not guilty as to the first and second counts, and guilty as to the third, which latter part of the verdict the court at once set aside without any motion by the defendant.

The district attorney immediately caused a similar indictment to be found, charging that on the 2d day of December, 1871, the same defendant did steal fifty pennies and certain keys, the property of John Ludy (the same as in the other indictment); did receive the same knowing them to have been stolen; and did enter the store of said John Ludy with intent to steal. Upon this third count the court forbade a second trial, the defendant pleading *autre fois convict*. To the first and second counts the defendant then pleaded *autre fois acquit*, averring that the transaction charged in them was a part and parcel of and identical with that charged in the first indictment, upon which the jury had rendered a verdict of not guilty. The district attorney replied *nul tiel record*. Counsel for the defendant moved the court either to strike off this replication, or to confine it to so much of the plea as averred the existence of a record, as the material part of the plea was, not so much that there was a particular record, but that the two indictments charged the same felony, a question that could not be decided by the court upon inspection, but must be passed upon by the jury on evidence to be laid before them.

The court sustained defendant's motion, and the district attorney then added to his replication, that the two indictments did not charge the same felony, but each declared a separate and distinct offence from the other—admitting the identity of person, but denying identity of fact. A jury was called to try the issue thus raised.

Evidence was then given to the jury showing that the date of the two indictments was the same, the prosecutor the same person in each case, and that the larceny of the pennies and keys had been mentioned by the prosecutor in the first case as occurring at the same time the tobacco, cigars and pipes were taken—at least he missed them all at one time—there having been no eye-witness to the theft.

Counsel for the defendant then argued that whenever different lots or classes of goods were feloniously taken at one time or at one venture of the thief, the transaction constituted but one larceny of the whole, and not separate and distinct larcenies of the different sets of goods, as many as there were different pieces or property taken; otherwise, if a man stole fifty pennies from a drawer at one time, he could be indicted separately for the larceny of each penny, and upon conviction be sentenced to an imprisonment of one hundred and fifty years. "The plea *autre fois acquit* was sufficient whenever the proof showed the second case to be the same transaction with the first, although the offence was called by a different name." *Dominick vs. Estate*, 40 Ala. 680. More certainly was this true where the offence in the two cases was called by the same name, which was the present case, a felony could not be cut up into pieces, but must be presented as a whole.

The district attorney argued *contra*.

The court said to the jury, that this evidence did not necessarily preclude the existence of separate and distinct offences, but it was for them to say whether the two indictments did or did not recite part of the same felony.

The jury found for the Commonwealth upon the issue, and the defendant was tried on the second indictment, and convicted.

[Leg. Int., Vol. 29, p. 85.]

COMMONWEALTH vs. MICHAEL BOYLE AND EDWARD JOHNSON.

A jury may seal their verdict and separate in a case of burglary.

Quere?—Whether the act of April 22, 1863, repeals section 135 of act of March 31, 1860.

At January term, 1872, the defendants were convicted of burglary, and moved for a new trial and in arrest of judgment. The principal reason relied on in support of the motion for new trial was, that the jury after retiring to consider of their verdict, announced to the officer in whose charge they were placed, that they had agreed upon a verdict and sealed it; they separated and went to their homes, and upon assembling next morning handed to the court their sealed verdict, which was received and recorded, under protest from defendant's counsel. The court had instructed them that when they had agreed upon their verdict they might seal it, separate for the night and hand it in next morning. It also appeared that the officer who had charge of them, had not been sworn, and had no knowledge that they had agreed upon a verdict and sealed it before separation, except from what the foreman had told him. It was urged by defendant's counsel that as this was a trial for high felony in a Court of Oyer and Terminer, no sealed verdict could be taken, and the jury should not have been allowed to separate until after they had returned their verdict in court.

In support of the motion in arrest of judgment, it was argued that the 135th section of the act of March 31, 1860, defining the crime of burglary in Pennsylvania, had been repealed by the 2d section of the act of 22d April, 1863; that as the act of 1863 included the crime of burglary (the breaking and entering of a dwelling-house by night with intent to commit a felony), making it a felony, punishable with a shorter term of imprisonment than that provided in the act of 1860, the 135th

section of the act of 1860 was thereby repealed. It was further contended that as the indictment was drawn under the act of 1860, and charged the offence to have been committed "burglariously," the conviction could not be sustained, and that the word "burglariously" could not be rejected as surplusage.

The court held, the president judge being on the bench with Peirce, J., at the time, that it had been the practice for twenty years to allow juries to seal their verdicts and separate in all but homicide cases; and a practice so long sanctioned and never interfered with by the Supreme Court was considered regular. As to the repeal of the act of 1860 by that of 1863, the question was not in terms decided, but both motions were overruled and a sentence of one year's imprisonment was imposed, which was within either act.

[Leg. Int., Vol. 29, p. 85.]

Before Paxson, J.

COMMONWEALTH vs. MICHAEL J. MACKIN.

The omission of the words "OF THE PEACE" in an indictment in the Quarter Sessions is fatal.

In this case, defendant, a constable, was indicted for extortion. The caption of the indictment was as follows: "In the Court of Quarter Sessions for the city and county of Philadelphia." The defendant demurred to the indictment, and set forth as ground for the demurrer, that the proceeding did not appear to have been in any court recognized in this State. The court held that the omission of the words "of the peace" after the word "sessions," was fatal to the indictment, and therefore the demurrer was sustained.

[Leg. Int., Vol. 29, p. 125.]

COMMONWEALTH vs. PEIFFER.

A defendant may be separately convicted of larceny, and of entering a dwelling with intent to steal.

Defendant was indicted in two bills, one charging larceny and the other charging entering a dwelling with intent to steal. The evidence showed that the offences recited in the two indictments were parts of the same act or enterprise, that defendant entered the house for the purpose of stealing and did steal before he went away; and therefore his counsel argued he could be convicted upon one bill only, otherwise he would be twice tried for the one offence. But the court said that the indictment charging larceny was for an offence against personal property, under the 111th section of the criminal code, and the other, for entering a house with intent to steal, charged an offence against real estate, under the 145th section of the same; the statute itself making this marked distinction between the two crimes.

Defendant was convicted and sentenced upon each indictment.

[Leg. Int., Vol. 29, p. 125.]

COMMONWEALTH vs. FEATHERSTON *et al.*

An advertisement in a newspaper "warning the public against the negotiation of notes, etc., alleged to have been stolen," is a privileged communication, and express malice must be shown to make it a libel.

The defendants, proprietors and publishers of the "Evening Bulletin" newspaper of this city, were tried upon the charge of libel. On the part of the Commonwealth, the evidence was, that J. C. Grady, Esq., a member of the bar, acting as counsel for one John Crosse, in a suit for fornication brought against John Workmen, of Wilmington, Delaware, settled the case, taking from Workmen three judgment notes and a check. Subsequently Workmen appeared at the "Bulletin" office, and producing an advertisement requested that it should be inserted in the edition that was about going to press. The clerk in the office, merely glancing at the article, and supposing it to be a notice of lost securities, at once sent it to the composing room and it was published in that day's issue. It was headed, "TO THE PUBLIC," and stated that Mr. Grady, attorney for Mr. Crosse, had obtained the notes by fraud, warned the public not to receive them by assignment or otherwise, and was signed by Workmen. Mr. Grady did not call upon defendants for explanation or reparation, but at once instituted legal proceedings against them, both criminal and civil.

The defence offered no evidence.

In charging the jury, the judge said that while the general law of libel undoubtedly was, that the proprietor of a newspaper was responsible for whatever appeared in its columns, yet there was an exception in favor of articles known as "privileged communications." When a person, about to engage a servant, wrote to a former employer of the same party asking information concerning his character, and the former employer wrote an answer containing matters injurious to the servant, this was a privileged communication. So, where written obligations had been stolen or obtained by fraud, the victim's only protection was to give notice of the fact to the public, and warn the whole world not to receive them, and the best, almost the only method of doing this, was by advertising in a public journal. Such a notice would be a privileged communication. The general rule of libel was, that its truth or falsehood was immaterial, and malice would be inferred, yet in the case of privileged communications, it was necessary to prove the falsity of the article, and express malice in the person accused. The present article came under the head of privileged articles, and falsehood and express malice would have to be shown.

The jury rendered a verdict of not guilty.

[Leg. Int., Vol. 29, p. 102.]

Before Finletter, J.

COMMONWEALTH vs. BENJAMIN K. FISHER.

What is a false pretence?

Defendant was indicted and tried upon the charge of obtaining money by means of false pretences, and the testimony submitted by

the Commonwealth was to the following effect: The defendant, a resident of Schuylkill county, called upon the prosecutors, wholesale grocers in this city, and represented to them that he was the agent of Sarah Fisher, of Schuylkill county, a widow in business for herself, and owning property, and he had full authority to contract debts for her; and he desired to buy goods for her on credit. And he offered to show them her title deeds to the store in which she did business and some ground adjoining, but these they declined to examine. Believing these statements to be true, they shipped a considerable lot of goods according to his direction, and took from him notes at thirty and sixty days, which he signed, "Sarah Fisher, per B. K. F." When these notes matured they were allowed to go to protest, and suits were brought upon them, but Sarah Fisher plead her coverture, that she was defendant's wife, and had not authorized him to give the notes. Then this criminal prosecution was instituted. The defence, as matter of fact, set forth that the prosecutors made thorough inquiries among business men in the city concerning these parties, and after ascertaining their real status shipped the goods, not on the strength of defendant's statements, but solely upon the faith of the result of their own investigation.

In charging the jury the judge held that in order to make one's belief in representations a proper foundation for a charge of obtaining goods by false pretences, the party was bound to use every means he had at hand to ascertain whether such representation was true or false, and therefore it was the duty of these prosecutors to have examined the proofs of the genuineness of defendant's statement that he offered them, for the deeds might have disclosed that Sarah Fisher was his wife. Also, that the representation must not only have been made and believed, but must have been the *sole* inducement to the giving of credit.

The defence had contended that the indictment was defective in that it did not charge the defendant to have represented the property to be of sufficient value to pay for the goods obtained; but this was held not to be necessary.

Also, it was argued that, as the prosecutors had not pursued their proceeding against the wife to its end, they were not in a condition to say that they had been cheated; but the court likewise held it not necessary to show the failure of the civil suit. If the representation met the requirements of the statute, and were false, that was sufficient; and the jury were not bound to find a motive that actuated the defendant.

Verdict not guilty.

[Leg. Int., Vol. 29, p. 125.]

Before Allison, P. J.

COMMONWEALTH vs. BRYANT.

It is not an assault and battery to resist an officer making an arrest without a warrant, for misdemeanor not committed in view of the officer.

Defendant was charged with assault and battery upon a policeman. He had committed a misdemeanor, which the officer neither saw nor heard, but being called upon by one of the injured parties, the latter arrested him without a warrant. Upon reaching the street some one

of the crowd tripped the officer, and the prisoner, violently loosening the officer's hold upon him, escaped. The officer went to his residence to arrest him, but the defendant induced him to retire by drawing a knife and threatening to stab him.

The court held, that as the defendant's original offence was only a misdemeanor, of which the officer had no personal knowledge, the latter had no right to arrest him without a warrant, and if he attempted to do so, the defendant might resist him with whatever force was necessary, without being liable to a prosecution for assault and battery.

[Leg. Int., Vol. 29, p. 125.]

COMMONWEALTH vs. McMENAMEE.

An indictment setting out the authority of an officer must name the office.

The indictment charged interfering with an officer of the mayor's police force while performing an order of "William S. Stokely," the fact being that he resisted the officer's attempt to arrest a third party for cruelty to a horse. The court held that though the indictment correctly named the person who was the mayor, yet if it failed to describe him as mayor, showing by what authority he gave the order to the officer, the indictment was defective and recited no offence. Verdict not guilty.

Court of Common Pleas, Philadelphia.

[Leg. Int., Vol. 29, p. 364.]

DUTTON *vs.* THE CITY.

1. By the ordinance of May 25, 1860, a bidder is required to give security upon each bid. Allison, P. J., and Finletter, J., dissent.
2. It is not a misdemeanor in office for an officer to receive a compensation for services which are not his official duty to perform. Finletter, J., dissents.

Sur motion to dissolve special injunction. Opinion delivered November 9, 1872, by

PAXSON, J.—The most important question raised in this case involves the proper construction of the ordinance of councils of the 25th of May, 1860. Said ordinance is as follows:

"Whereas, difficulty has frequently arisen by the presentation of a variety of bids by the same person for the construction of culverts and other works authorized by the city of Philadelphia, and the same has operated to the prejudice of the city as well as to well-meaning contractors.

"Therefore, every advertisement for proposals for public work to be done, or materials to be furnished for or on behalf of the city, shall state that the person or persons who shall bid for the same, shall, in the first place, be required to enter security at the law department in the sum of \$500, conditioned that if his or their bid is the lowest, and he or they shall decline to do the said work or furnish said materials, that he or they shall pay to the city the difference between the amount of his or their bid and the bid of them or him who shall actually perform said work or furnish said materials, and no bid shall be considered unless there be a certificate that the provisions of this ordinance have been complied with: *Provided*, that this ordinance shall apply only to bids exceeding in amount the sum of \$500."

On the 3d of May last, the chief commissioner of highways advertised for sealed proposals for the construction of sixty-four sewers, and Mr. Benjamin F. Dutton, the complainant in this bill, became a bidder for all of the said work. It appears that he was the lowest bidder for twenty-three of the sewers, and he claims to be entitled to the contracts for the construction thereof. The chief commissioner of highways, however, declined to award the contracts to Mr. Dutton, for the reason, as alleged in the bill, that the city solicitor had advised that officer that security had not been entered as required by the ordinance referred to. The facts briefly stated are, that the city solicitor required that bidders should enter security in \$500 for each sewer, while Mr. Dutton contended that one bond in \$500 was sufficient to cover his entire bids for the sixty-four sewers.

In this state of the case Mr. Dutton filed this bill against the city and Mahlon H. Dickinson, chief commissioner of highways, setting forth the facts in detail, and praying, *inter alia*, for an injunction restraining defendants from awarding to any person other than the plaintiff, the construction of the above-mentioned sewers, twenty-three in number, and

from contracting with any other persons for such construction. Upon the filing of this bill an *ex parte* injunction was granted, in accordance with the prayer thereof. Subsequently the case was argued before my brother Finletter, who made the following order:

"And now this 20th day of July, 1872, after argument and upon advisement, the court do modify the special injunction heretofore granted, in such way and manner that the defendants are and shall be enjoined against awarding to any person or persons other than the lowest and best bidder or bidders, for the twenty-three sewers described in plaintiff's bill, the contract for the construction thereof; and shall be further enjoined from entering into any contract for the construction of said sewers with any other than such bidder or bidders; and so modified the special injunction shall be continued until final hearing."

Subsequently an answer was filed by the city, admitting many of the facts alleged in the bill, but alleging that the proper meaning of the said ordinance is, "that no bid shall be considered under any advertisement for work, or the supply of materials, unless such bid shall be from one who has entered security at the law department, conditioned as in said ordinance is ordained. In all cases where the advertisement is for several pieces of work, which require several bids, each bid must have the security specified in the ordinance to secure its consideration." The answer further sets forth: "And these respondents are advised, that, as it is admitted, there is no security entered at the law department, to which these respondents could have recourse, for the sewers for which the plaintiff is the lowest bidder, he is confessedly a person not within the advertisement, nor according to the requirements of the ordinance aforesaid, and has, therefore, no standing in a court of equity."

Upon the filing of this answer the defendants moved to dissolve the special injunction. This was strictly according to the practice in equity, and brings up the whole equities of the case; the answer being treated as a mere affidavit. It will be seen, however, that the case is in a different position from what it was when argued before Judge Finletter.

It was alleged that the difference between the aggregate of Mr. Dutton's bids for the twenty-three sewers, and the next highest bidder's therefor, was \$3588.46, and that if the contracts were awarded to the latter the city would be the loser by that sum. We are informed that since the granting of the special injunction, the chief commissioner of highways has awarded to the plaintiff the construction of all of said sewers; and that with the exception of a few of the smaller ones, the contracts therefor have actually been made with the city. This does not appear in the cause, and of course, could not legally and properly have any influence upon the decision of the questions of law involved. It is referred to only as showing that the city can neither lose nor gain any important sum as an immediate result of our decision. Were it otherwise, our duty would require us to decide the case according to the rules of law.

The custom or practice of the law department under said ordinance has been cited on both sides of this question. On the one hand the complainant alleges that "where proposals for several articles are solicited by one advertisement, each person proposing to bid therefor has been required by the law department to enter one security in the sum

of \$500, conditioned as aforesaid, in case of his refusal to do all the work or furnish all the materials which he shall propose to do or furnish under said advertisement. It has not been customary to give security in each case for each item of the bid under such advertisement. On the contrary, the invariable custom has been to demand but one security for \$500 to cover all proposals by each single person, made under one advertisement. This custom continued at the law department, and has been pursued by the present city solicitor."

On the other hand the city solicitor says :

On submission of the matter to me, I instructed my assistant, that as each sewer was a separate and distinct piece of work, which could be accepted or declined by the bidder at his option, the city would be unprotected against a combination among the contractors, unless the bidder bound himself in the sum of \$500, according to law, to construct *each* sewer which might be awarded to him ; and in this opinion I was sustained by the gentleman who drafted the ordinance, and such has been the uniform construction of the ordinance by the law department, since the administration of Charles E. Lex, Esq., in which it was passed. In fact, I am now suing out bonds against persons who failed to accept contracts awarded them by the board of health for street-cleaning, from whom the city might not recover a penny, had not I required the bidder to file a separate bond for each district for which he was a bidder."

We do not attach any especial importance to what has been said as to the practice of the law department. Our duty is to place a proper construction upon the ordinance referred to, in order that if an erroneous custom has grown up under it in the office of the city solicitor it may be corrected.

The object of the ordinance is plainly indicated in the preamble. It was to prevent the presentation of a variety of bids by the same person, for the construction of culverts, and other public works authorized by the city. The mischief was the presentation of bids by irresponsible parties, who purposely underbid to obtain the award, without a thought of complying therewith, in order that upon his or their failure, the contract might be awarded to the next highest, who generally was the real bidder. By this kind of collusion, it was entirely competent to obtain contracts at extravagant prices, and thus to defraud the city. This ordinance was intended to prevent this evil, and we must give it such construction as will best conform to this intent, having regard of course, to the terms of the ordinance itself. In this case, the advertisement called for bids for the construction of sixty-four sewers. Each sewer was a distinct, independent piece of work, as much so as the building of a house. The bids were separate for each sewer. That they were all embraced upon one piece of paper is not material. The bids were notwithstanding separate, different prices being specified for the different sewers. And as conclusive upon this point, we have the fact, that while Mr. Dutton bid for sixty-four sewers, he was awarded the contract for only twenty-three thereof. It is to be observed, also, that after the bids are accepted, separate contracts are made for the construction of each sewer. Under the construction of the ordinance contended for by the plaintiff, a single bond of \$500 might be made to cover bids for separate

works, aggregating in value, millions of dollars. Surely the framers of this ordinance never contemplated such a result as this.

But it was urged that one bond of \$500 was sufficient to cover the entire sixty-four bids, because they were all embraced in one advertisement. We do not see the force of this. It was proper for the chief commissioner of highways to include them all in one advertisement to save expense to the city. But the separate character of the work remained the same, the advertisement called for *bids*, not for a bid; and separate bids were put in as before stated. We would suggest for the guidance of the officer referred to, that hereafter in his advertisement for work of this character, he state explicitly, that separate bids will be required for each work, and security in \$500 for each bid. This will prevent all misapprehension in the future.

If the proper construction of the ordinance depended upon the advertisement, then the chief commissioner of highways could mould said ordinance to suit his own purposes, or those of his friends, by a mere change of the form of the advertisement. We cannot lend our sanction to such a view as this.

We are of opinion that the city solicitor was substantially correct in his view of this ordinance; that the said ordinance contemplated a separate bid for each sewer, and security in \$500 on each bid; and that the plaintiff not having complied with its terms, was not a legal bidder for the work referred to. Judge Peirce thinks that one bond is sufficient to cover any number of bids, provided the amount of the bond is equivalent to \$500 upon each bid. Perhaps this is so. It is not very material in what form the security is entered, if the substantial requirements of the ordinance are complied with.

Some reference was made at the argument to the right of the city solicitor to receive a fee or compensation for preparing bonds of this description. It is but just to that officer, that the opinion of the court upon this point should be stated.

The plaintiff alleges that the sum of two dollars and fifty cents was demanded at the law department for the preparation of each bond. On the other hand, the city solicitor says (see page 4 of exhibit A of answer), "I desire to say that no charge has ever been exacted for this service, but it has always been the custom of the office under my predecessors, since 1860, to prepare these bonds for such compensation as the person entering them thought proper to pay, and in no case since the commencement of my administration has it exceeded two dollars."

If the city solicitor had no right to receive a compensation for doing this particular thing, it can make no possible difference whether he made a direct charge or received it as a voluntary payment or gratuity. We desire to leave no room for misapprehension on this point. A public officer who receives a fee, gratuity or reward not authorized by statute, for the performance of official duty, violates the law. So boldly does this stand out upon our statute-book that it is provided by the 26th section of the act of 28th of March, 1814 (Purd. 472, pl. 78), that "if the judges of any court within this Commonwealth shall allow any officer, under any pretence whatsoever, any fees under the denomination of compensatory fees, for any services not specified in this act, or some other act of assembly, it shall be considered a misdemeanor in office."

It will be seen, therefore, that it becomes important to ascertain whether it is any part of the official duty of the city solicitor to prepare the bonds of parties who desire to become bidders for sewers or other work of the city. The ordinance of August 22, 1854, establishing the law department of the city of Philadelphia, ordains that "it shall be the duty of the city solicitor to prepare all bonds, obligations, etc., which may be required of him by any ordinance." It will be noticed that by the terms of the ordinance of 25th May, 1860, first above cited, bidders are required "to enter security at the law department in the sum of \$500, conditioned," etc. This means that the bidder shall file his bond in the law department, with such security as the city solicitor shall approve. It is utterly immaterial who prepares the bond. The bidder may employ any lawyer, conveyancer, or other person, to fill it up. He has no right to require the law officer of the city to do so, for the reason that it is no part of his official duty. The city has no interest in such bond when filed, except in the contingency of the obligor becoming the lowest and best bidder, and the awarding to him by the highway department of the contract.

It would appear that councils have already legislated upon another branch of this subject. By the 3d section of ordinance of July 5, 1870, it is provided, that "the costs and charges of preparing said contracts, bond and warrant, searches, stamps, entering satisfaction, and all other expenses incident thereto, shall be paid by said contractor or contractors." It might, perhaps, be well for councils to legislate further, and provide specifically for the case under consideration, as well as for all bonds required to be filed in the law department. We quite agree with the learned and eminent counsel who argued this case with the city solicitor, that it would be better for that officer to decline to prepare such bonds in the future until such time as councils shall regulate the subject-matter by ordinance.

As the case now stands, however, in the absence of any law or ordinance making it the official duty of the city solicitor to prepare the bonds for bidders, we are clear in our judgment that the receipt of a fee or compensation by that officer, from Mr. Dutton or any other bidder, for the purpose aforesaid, is not a violation of law nor a misdemeanor in office.

It remains but to consider what order shall be made in this case. No exception can be taken to the tone or spirit of the decree modifying and continuing the special injunction. It does not, however, conform to the prayer of the bill, which is for an injunction to restrain defendants from awarding to any person other than plaintiff, the construction of said sewers; and from contracting with said other persons for such constructions. Nor is it aided by the prayer for general relief, for under such prayer a special injunction cannot go out. *Story's Equity*, Pl., § 41; *Eden on Injunc.* (2d Amer. ed.) 73, 74; 2 *Story's Eq. Jurisprudence*, § 862, 863; *Walker vs. Devereaux*, 4 Paige, 248. Aside from this view of the case, this plaintiff has no equity. He complains as a bidder, alleging that he is the lowest and best bidder. We have already seen that not having complied with the ordinance, he was not a bidder at all in contemplation of law. As a tax-payer he has no standing, for he has not filed his bill as such. Nor would it help him if he had; as a tax-

payer has no equity to require the head of a department to award a contract to a bidder who has not complied with the ordinance of councils.

President Judge Allison did not sit at the argument of this motion. He joined us in consultation at our request, and authorizes me to say that he concurs, as do Judges Ludlow and Peirce, in the views herein expressed upon the question of the city solicitor's fees. He differs from the majority of the court, however, as to the construction of the ordinance of the 25th of May, 1860, and is of the opinion that said ordinance vests in the chief commissioner of highways a discretion as to the number of sewers he may embrace in one advertisement, and that if said advertisement include proposals for more than one sewer, a single bond in \$500 is sufficient to cover a bid or bids for them all. The majority of the court concede that proposals for any number of sewers may be included in one advertisement; but hold that said advertisement should call for separate bids and security in \$500 upon each bid.

The injunction heretofore granted in this case is dissolved.

Dissenting opinion by FINLETTER, J., *November 9, 1872.*

The plaintiff, in his bill, averred *inter alia*, as follows:

(9.) "I am a resident and tax-payer in the city of Philadelphia."

(15.) "My proposals were offered in due form, and it was found that I was the best and lowest bidder for the construction of the following sewers," etc.

(16.) "I am ready to perform all the work so proposed to be done by me, and to give the most satisfactory security therefor."

(17.) "The chief commissioner of highways, acting solely in accordance with the instructions of the city solicitor, though desiring to award the said work to me as the lowest and best bidder, threatens to award the construction of said sewers to other bidders who were not the lowest and best bidders therefor, whereby the city will incur a loss of \$3588.46 as appears by the exhibit C, hereto annexed."

These averments have never been denied. They have never been answered, and must be taken as confessed by the defendants.

By the ordinance of May 12, 1866, it is the duty of the chief commissioner of highways to have the work of the city done at the lowest and best prices. It is a corrupt violation of this duty knowingly to award a contract by which the city will be compelled to pay \$3588.46 unnecessarily. When it appeared that he threatened to do this illegal act, we restrained him.

The city solicitor now moves to dissolve our injunction. If this motion prevail, there will be nothing to prevent frauds upon the city, because if the contracts can be given to the *next* lowest bidder, they may be given to the *highest*. There should be good reasons to prompt us to such action.

When may a motion to dissolve a special injunction be entertained? Kerr on Injunctions, page 12, says: "The court deals with the injunction upon the evidence before it. If there be any new facts, the defendant may avail himself of them at the hearing or on the motion to dissolve."

Judge Agnew, in *Kneedler vs. Lane*, 9 Wr. 308, says: "It is true, as a general rule, that the court will not be moved summarily to dissolve an injunction without a suggestion of new facts, and will leave the party to an issue formed on the due course of pleading."

Judge Woodward, page 326, says: "I do not deny that a judge at *nisi prius* may dissolve a special injunction upon coming in of the answer to the plaintiff's bill, provided it be a direct and full denial of the equities alleged, or upon an affidavit disproving the plaintiff's equity.

"Where an answer plainly and distinctly denies the facts and circumstances upon which the equity of the bill is based, the injunction will be dissolved. *Mene vs. Ferrell*, 1 Kelly's R. 7."

In order to warrant the dissolution of an injunction upon bill and answer, it is necessary that the answer should deny all material allegations of the bill with the same clearness and certainty as they are charged. *Buckner vs. Brain*, 9 L. M., 3, 4. A denial from information and belief is not sufficient. 1 Hopkins, 48; 1 Paige, 100, 311, and 3 Sumner, 78. Nor is an answer merely literal which does not traverse the substance of the charge. *Every vs. Rice*, 3 Green, 53.

An answer, to be effective for any purpose, must answer directly and precisely every material allegation in the bill, and not by way of a negative pregnant, or argumentatively. The charges are not to be answered literally, but the defendant must confess or traverse the substance of each charge positively and with certainty. *Woods vs. Morrell*, 1 Johnson, 103.

The well-known principle that the charges in a bill not answered must be taken as confessed, requires no citation of authorities.

The answer in this case is not under oath or affirmation. There is the best authority to show that such an answer is not to be considered as evidence, but merely as a denial of the allegations in the bill analogous to the general issue at law. *Brown vs. Blydenburg*, 5 Selden, 146; *Union Bank of Georgetown vs. Gray*, 5 Peters, 99, 110; and *Smith vs. Clark*, 4 Paige R. 368.

With these principles in view, let us analyze the answer. It admits the first, second, third, fourth, fifth, eighth, and ninth paragraphs of the bill to be true, and alleges simply want of knowledge of the practice averred in the sixth, seventh, eleventh, twelfth, and thirteenth. In all other respects it is argumentative and irresponsive, and therefore defective.

The fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth paragraphs of the bill, which charge facts not only most material, but sufficient alone to require the restraining power of the court, are wholly unanswered.

It will be observed that the answer sets out no new facts. Nor does it deny that the plaintiff is a citizen and tax-payer, and the lowest and the best bidder, and that the defendants threaten to award the contract in violation of law, whereby the city will incur a loss of \$3588.46. These are the uncontroverted equities upon which the injunction now stands. How can we then dissolve it?

If these views be incorrect, the defendants, by their own acts, have concluded themselves. It appears by the affidavit of the plaintiff, filed of record in this case, that they have awarded to him all the contracts, and that he has completed eighteen of the twenty-three sewers, the subject matter of the bill. They are now estopped from saying or doing anything which would call in question the validity of awarding the contracts or anything which might be done under them.

Again, the defendants, by awarding the contracts to plaintiff, have withdrawn from the control of the court the very subjects of the bill and decree. There is nothing left upon which any further order of the court can take effect. The life's blood of the case being gone, it is not our duty to galvanize or bury the corpse.

This opinion should, in strictness, end here. A proper respect, however, for the views of the majority of the court, requires other topics to be noted.

The fallacy of the answer and argument of the defendants is, in assuming that the plaintiff complains merely as the lowest and best bidder, and that our decree enjoined them from awarding the contracts to any one except the plaintiff. Such is not the decree, and the plaintiff complains as a tax-payer and a resident of the city. The averment that he is the lowest and best bidder is introduced to show his equities as a tax-payer. It is preliminary and necessary to the material charge that the defendants are about to award the contracts to one who is a higher bidder, in violation of law. He avers:

1st. That he is in fact the lowest and best bidder.

2d. That he is such a bidder under the ordinance.

The first position is admitted; the second only is contested.

In *Smith vs. The City*, 2 Brew. 443, the complaint was, that "the contract was awarded to the defendant (McGlue) although he had not filed any bond with the city solicitor prior to the award of the contract to him, as required by said ordinance, and the ordinance of May 25, 1860." In dismissing the complaint, Judge Brewster says: "The bond required by the ordinance of May 25, 1860, is not the security to be exacted for the faithful performance of the contract, but simply a guaranty that the lowest bidder will come forward, give the required security, and sign the formal agreement. *This is clearly a stipulation which the city authorities might in the exercise of an honest discretion, insist upon or waive at their pleasure.*"

This is our own judicial recognition of the doctrine that the ordinance of May 25, 1860, in this respect, is only directory, and that a bid in the hands of the chief commissioner of highways, need not have all the formalities specified in the ordinance to make it effective, if it be in fact the lowest and best bid. If, "in the exercise of an honest discretion," he waives a "stipulation," and does regard a proposal, then the ordinance of 1866 intervenes to prevent him from awarding the contract to a higher bidder.

There was no dissent to this opinion of Judge Brewster; and for years, it has been the published, recognized doctrine of the whole court. It has been an authority which the whole community were bound to observe, and act upon. It acquired additional force from the fact that the learned judge had been for many years city solicitor, and knew practically whereof he spoke. It was an authority which I was compelled to respect and follow with the same confidence and faith, that I will give to the decree which blots it out from our books of reports, and from the records of this court.

It must not, however, be forgotten, that it is the advertisement of the commissioner which fixes the character of the work, and bid, and security to be entered. It is not questioned, that the plaintiff entered two

bonds for \$500 each. He tendered the security as for a single bid for the whole work. He filed a sealed proposal for it as advertised, which was received and indorsed by the defendants, "proposal for sewers," and duly considered with all the other proposals.

Has he a right to file a single bid under the advertisement? It is as follows:

"Sealed proposals will be received at the office of the chief commissioner of highways, until 12 m., on Monday, June 3, for the construction of the following sewers."

Can it be doubted under this, that a bid for a given sum per foot, or a gross sum for all the work would have been such as the commissioners were bound to consider? The words, "sealed proposals," mean an aggregate of single bids from all the bidders; not bids from an individual. This is manifest from the advertisements for single sewers, which invariably have been as follows:

"Sealed proposals will be received at the office, etc., for the construction of a sewer on the line of, etc."

Whenever the commissioner desires that there should be a bid for each sewer, the advertisement is in this form:

Sealed proposals will be received, etc., for the construction of a sewer on the line of, etc. *Also*, on the line of, etc.

It seems very apparent that the advertisement under consideration was intended to call for a bid from each person for the whole work, or at least, that such a bid was not informal or improper.

The bidder, by the ordinance, is "required to *enter security* in the sum of \$500." If it be conceded that this necessarily means \$500 for each sewer, it does not necessarily mean that a separate or any bond shall be entered. Security in any form is all that the ordinance requires.

By paragraph thirteen, of the bill, which is not denied by the defendants, the plaintiff avers that he was informed by the city solicitor, that "in order to bid for said work so advertised, I would be compelled to give sixty bonds, to enter \$30,000 security, and pay \$150 in cash, for the mere privilege of bidding to do the work. I refused to do this, and insisted upon his preparing one bond to cover my whole bid, which I then and there offered, and was prepared to execute with the most satisfactory security. The city solicitor refused to prepare or receive any such bond, but prepared two in \$500 each, in a form against which I protested."

If these bonds be defective in form or substance, the fault is with the city solicitor, the agent of the defendants. He refused to prepare or receive a bond "executed with the most satisfactory security." Should the defendants now be allowed to take advantage of their own wrong? In equity the plaintiff must be considered as having done all that he was prevented from doing by the defendants. What he offered to do would have made him a legal bidder under any construction of the ordinance. We must, therefore, regard him as a bidder complying with the requirement of the law.

But the defendants have not in any way undertaken to deny that the plaintiff was the lowest and best bidder, except as follows:

"He is confessedly not a person bidding within the advertisement, nor according to the requirements of the ordinance aforesaid, and has, there-

fore, no standing in a court of equity." It is not shown how or wherein this is confessed. It is obvious if it be not confessed then, this is no denial of the *'status* of the plaintiff, even *arguendo*. Wherever it is proper in the bill, the plaintiff in the strongest terms avers that he is the lowest and best bidder; and in addition a bidder, complying with every requirement of the ordinance. In paragraph eighteen, which stands confessed by the defendants, he says: "I am advised, and therefore aver, that I did all that I could do under the circumstances, to comply with the requisites of said ordinance of 25th May, 1860, and that I did comply."

What construction should we now put upon the ordinance of 1860? The construction of those who enact a law, and those who administer it, if contemporaneous, continuous, and frequently acted upon is, always supposed to indicate the spirit and meaning of the act, and the intention of the makers. It should not be reversed unless to correct an evil, or promote a good.

From the passage of the ordinance of 1860, to the 3d day of June, 1872, the almost daily construction which the councils, the heads of department, and every city solicitor acted upon, is adverse to the construction which was attempted to be enforced upon that day. This is admitted by the 2d section of the answer.

The present decision of the court corrects no evil, for none has existed, and it is not apparent that any good can result therefrom. The evils which flow from it are:

1st. The expense and excessive security will deter bidders and prevent competition.

2d. The expense of bidding will be added to the proposal and in so much at least the cost to the city will be increased.

3d. It will destroy the secrecy of bidding and will facilitate combinations to raise the price of public work.

4th. It will give some persons the means of knowing exactly what portions of the work are not proposed for, and will also give them the opportunity of fixing their own prices.

It will thus engender frauds upon honest contractors, and increase the expenses of the city.

The right of the court to mould its decrees to conform to the equities, cannot be questioned. 1 Story's Eq. Jur. § 437. A decree may embrace matters not charged in the bill. *Davenport vs. Stafford*, 14 Bevan, 319. It is an undoubted principle that, when a court of equity has assumed jurisdiction it may and will do all things within its functions, to confirm that jurisdiction, and to carry into effect the equities of the cause. Therefore it is, that the utmost liberality is exercised in permitting amendments. Nor will an objection which may be avoided by amendments be allowed to prevent a decree otherwise required. This is especially so whenever we are invoked to stay the illegal expenditure of public money. In *McIntyre vs. The Building Commissioners*, the plaintiffs had not averred that they were tax-payers. It was a fatal defect. Notwithstanding this, an injunction was awarded by the court, with leave to the plaintiff to amend his bill. In that opinion and decree my brethren concurred. This course has been pursued in innumerable cases by our Supreme Court.

The plaintiff charged in his bill a corrupt violation of law which must result in injury to the public, and to himself. The prayer is for an injunction to prevent this wrong. We are asked to do this in a particular way in view of his asserted position as a bidder. We regard him principally as a tax-payer. In granting his prayer as such for an injunction, we modified the decree to meet the exigency, and the provisions of the law which required the contract to be given to the lowest and best bidder. We could not give him more than he prayed for. We might, however, give him less, and in such manner as we believed the equities demanded.

The decree varies from the prayer in substituting the words, "lowest and best bidder" for the word "myself." The plaintiff had averred that he was the lowest and best bidder. There could have been no form of decree which would embrace the word "myself." That word in the prayer represented the plaintiff. Any words in the decree which did that would properly stand for the word "myself." The plaintiff is the only "lowest and best bidder" known to or by the proceedings. These words in the decree, therefore, necessarily represent the plaintiff.

If, however, these views be incorrect, it must be remembered, that no objection was made by the defendants to the form or substance of the decree, either in pleading or in argument. If it had been we could not have refused the application to amend. We should not regard such an objection without giving the party in interest an opportunity to be heard. Any other course might entrap suitors to their ruin.

If it be admitted that the city solicitor has a right to act as counsel for the bidder and the city at the same time, in interests naturally antagonistic and receive pay from both, it is not clear how this can affect the present question. The decree does not operate upon him, or his prerogatives, or perquisites.

The ordinance of 1854 declares it to be the duty of the city solicitor to prepare all bonds, obligations, etc., which are required of him by any ordinance. The ordinance of 1860 says, the *bidder shall enter security at the law department*. Who shall see that it is proper and properly entered? Unquestionably the city solicitor. It is an obligation required by the ordinance to be entered under his supervision, and, therefore, an obligation required of him by an ordinance, and within the ordinance of 1854.

Having prepared the bond or security, has he a right to charge the bidder? The ordinance of 1870 has been invoked to justify the charge. It has reference, however, only to contracts, and not to bids for contracts. How, then, can it justify a charge for proposal bonds? It required an ordinance to permit charges for contract bonds, and, why should not an ordinance be required to allow a charge for proposal bonds?

In any aspect, the question is not, has the city solicitor a right to charge, but had he a right to act at all for the bidder? The security is for the protection of the city. It is against the interest of the bidder because it imposes liabilities upon him. The city solicitor must act for the city in all things pertaining to the security, and can have no interest inconsistent with that duty. If he act as counsel for the bidder in any stage of the proceeding, it might be his duty to make all things tend to the interest of that client.

But it can only be stated, that an attorney cannot act for opposing

interests. It cannot be reasoned upon. We might as well attempt to demonstrate logically, "Thou shall not steal," or any other command of the decalogue.

I regret that I am compelled to express my dissent. I cannot, however, find in the merits of the present application, or in the arguments of counsel, or in the views of the majority (and I have no desire to look beyond), an adequate reason for dissolving the decree before final hearing upon reapplication and proofs.

The decree determined no man's right, and has produced no inconvenience. It spoke to the chief commissioner simply in the language of the law. It did not in any way interfere with the honest exercise of his discretion. It stayed the hand of corrupt official waste, and no more. It was founded upon the established authority of this court, and might well have waited the ordinary course of judicial proceedings. To set it aside now, we must, I am convinced, overrule a judgment of this court which was a law even unto ourselves; and we must also disregard well-known principles of law, evidence and practice.

The interlocutory decree was entered upon affidavits from both sides, in which all the facts were fully set out. The arguments were elaborate, and embraced every view of the question. With the whole case, then, before me, I discussed the subject more fully than would be proper upon this occasion. Upon the maturest reflection and consideration of the views of the distinguished counsel, and of my more experienced brethren, I cannot strike from or alter a word in that decree, or in the opinion upon which it is based. No new facts, or other principles of law were suggested by the answer or arguments of counsel upon the motion to dissolve. Indeed, the argument took a much narrower range, and the affidavits were not all considered. I must, therefore, regard the present application as an appeal from the judgment of one judge, to the whole court, with nothing to warrant it.

But above all, I believe that this decision of the court will be so construed as to make more defiant the spirit of public plunder. If this should follow, it will give me but little consolation to know that I did not acquiesce in a decree which will have produced such a result.

J. G. Johnson, Esq., for plaintiff.

City Solicitor Collis and Hon. William M. Meredith, with whom was William J. McElroy, for the city of Philadelphia.

Court of Common Pleas of Armstrong County.

[Leg. Int., Vol. 29, p. 125.]

IN THE MATTER OF THE APPLICATION OF THE HEBRON EVANGELICAL LUTHERAN CHURCH OF LEECHBURG, TO AMEND ITS CHARTER.

A charter of a church will not be amended so as to alter its original principles, even if asked by a majority of the congregation, where the minority object.

Heard on petition, answer, and evidence. Opinion delivered by

LOGAN, P. J.—This case has been thought to involve in its decision questions of faith and religious doctrine. Evidence of profound religious learning distinguish portions of the testimony, and marked familiarity with doctrinal points characterized the arguments of counsel. The gentlemen immediately representing the conflicting interests to be adjudicated, would seem to hold not only honest, but decided convictions on the various constructions severally insisted on as the correct representation of their doctrinal faith. Our duty, however, is but the exercise of a judicial function in determining whether, under the laws of the land and of this corporation, the amendment demanded can be granted, and we shall refer to doctrinal questions only as they may be necessary to guide us in the inquiry.

From the petition in this case, we learn that this congregation was incorporated in this court by a decree of the 22d June, 1848. This charter provided *inter alia*, that "the pastor or pastors of this congregation shall be in communion with some Evangelical Lutheran Synod in the United States of America." It further appears that the charter was amended by decree of this court of 15th of March, 1864, providing *inter alia*, that "the pastor or pastors of this congregation shall be members of some Evangelical Lutheran Synod which is in connection with a General Synod of the Lutheran Church in the United States." The present application is to change the amendment of 1864, so as to read, "that no minister shall be eligible to the office of pastor of this congregation, unless he be a member of the Pittsburgh Synod of the Evangelical Lutheran Church, or connect himself with it as soon as possible after his election, and a failure to be so connected shall be considered a resignation of his office as pastor of this congregation," and to remove and repeal in both supplement and charter everything inconsistent with this amendment.

It is claimed by the petitioners that the present amendment had the approval of a majority of the trustees and congregation, and that the petition is also signed by a majority. The remonstrants, who likewise claim to have been a majority, wish to retain the before recited amendment of 1864, and are opposed to the connection sought to be imposed by the proposed amendment, and claim that the church property is in possession of a pastor and people, the petitioners in this case, who are in connection with the Pittsburgh Synod, which synod is not in connection with the general synod.

It seems to be conceded on all hands that the Pittsburgh Synod is not

connected with the general synod, but with the general council of the Lutheran Church. It may be further stated that the general synod and general council, whilst both claiming to be within the Lutheran Church, are yet in antagonism, neither yielding recognition or obedience to the other.

The evidence would seem further to establish that, until some time in 1867, this congregation unitedly conformed to the connection expressed in the amendment of 1864, when the petitioning pastor and membership petitioning severed their connection through their synod with the general synod, and by this amendment seek to sever the corporation from such connection, and the remonstrants desire to retain such connection.

Conceding for the present the claim of applicants to a majority, both of voters and petitioners, the question is, should this amendment be allowed in the face of the objection of at least a large minority?

It is urged by petitioners' counsel that, we will have to exclude the amendment of 1864 from our consideration in examining the charter, because, as they allege, this amendment is void. The first reason given for this is, that because the original deed required no connection with any synod, therefore an attempt by the charter to restrain the use of the property to a church in connection with a particular synod, would be utterly void. We cannot speak definitely of the contents of this deed, because we have not been furnished with it. Assuming, however, the fact to be correctly stated, the argument proves too much. If the court had no power to insert the provision of 1864, for the reason that it imposed a connection with a particular synod, how can we grant the present amendment as it is also a limitation in connection with a particular synod? If there is no power to do one there is no power to do the other. It is again insisted in an ingenious argument that the amendment of 1864 was void, because, having only reference to an ecclesiastical relation with the supervising body, a majority in such matter could control, and no charter could take away such right. If this means that a majority were opposed to the amendment at the time of its adoption, then we are without evidence to support the position. If it means, however, that a majority can control independent of the charter, then again does the counsel prove too much, because, if such a matter be not the subject of control by charter, and the act of the court imposing such provision be void, why grant the amendment here sought, as it is of similar character? Can we by doing a present void act, avoid an existing nullity?

It is again insisted that the amendment of 1864 was not legally obtained nor formally accepted, and, therefore, not binding. On this point it is sufficient to say what would as well be in answer to the two last positions—that in no manner is this question raised by the record of this case. On the contrary, the petition recites the amendment of 1864 as a part of the charter, and seeks to avoid it not by asserting its nullity, but by the decree of this court in granting the amendment now sought. We do not, at present, say what might be the effect were this an application to open or set aside that decree. It is enough to say, that here the question cannot be inquired of. But more, this amendment was acted under for almost if not quite three years, and it is held in the *Commonwealth ex rel. vs. Cullen et al.*, 1 Harris, 140, that a single unequivocal act may be potent enough conclusively to establish assent.

We are, therefore, compelled to regard this as an existing and valid provision of the charter, and in that light must examine this application.

Should we then at the request of the majority and against the protest of a large minority of the corporation so change the charter as to deprive this minority of the use of the church property in the way allowed by that charter? Can we, by an amendment to a charter, divest the vested interest of one branch of a denomination in the church property, and vest it in another and antagonistic branch, against the protest of a minority? It is urged, however, that this is not a question of property. With this we cannot agree. Mr. Sarver, the pastor of the petitioners, with the adherents to his views, desires to continue the use of the church property under a synodical connection, which the present charter does not admit, and the present amendment is desired that he may by the terms of the charter, when thus amended, have the use of the property with his adherents. Of course, this is not a possessory action, but its effect is to give title under which possession may be enforced. To say this matter does not involve a question of property, is to hold that a deed for real estate does not involve the question of property, because it might require an action to enforce possession under the deed. Recurring, then, to the proposed amendment.

In the case of *Miller vs. Schnorr*, 28 Leg. Int. 29, Justice Sharswood, adopting *McGinnis vs. Watson*, 5 Wr. 9, holds that, "the title to the church property of a divided congregation, is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws, usages, customs and principles which were accepted among them before the dispute began, are the standards for determining which party is right." And this case further holds that it is unimportant on which side the majority is. By this rule we are bound.

As we have seen, this dispute arose in 1866 or 1867, by the petitioners having through the synod with which they stand connected, dissolved their relation with the general synod, and those remonstrating, retaining that connection.

The charter of this congregation to the extent of its expression, was the law of the corporation before and at the time this dispute began. To that charter we must look for any expression of ecclesiastical law, usage, custom, or principle relating to the present question. Within that charter (in that part of the amendment of 1864, before quoted), we find that the pastor or pastors shall be members of some Evangelical Lutheran Synod, which shall be in connection with the general synod, and etc. This, then, was a constituent part of the law of the congregation at the time the dispute arose, and as to the subject of which it treats is controlling. The present amendment is, by its preface and its terms as stated in the petition, to change and repeal this part of the charter by the substitution of a new synodical connection consistent with the views of the petitioners, and is asked as a right because claimed by a majority of the corporation. With which side is the doctrinal right in this controversy we cannot inquire. It is enough for us to know that at least a large minority of the corporation desire to retain a connection consistent with the terms of the charter as existing when the dispute began, and to that end resist this application.

To allow this amendment would be but to take this church property

from those who have followed the law of its charter and give it to those who seek by this amendment to establish a new law. To do this would be in violation of the announced opinion of our Supreme Court. This amendment cannot, therefore, be granted, and it is ordered:

And now, to wit, August, 1871, this case coming on to be heard on reasons shown why the amendment should not be allowed, and after argument and due consideration, it is adjudged that the said reasons and showing of the remonstrants, are sufficient in law and fact against the allowance or granting of said amendment, and the said amendments are hereby disallowed.

E. S. Golden, Esq., for petition.

Hon. Edgar Cowan and Jackson Boggs, Esq., for respondents.

Court of Common Pleas of Berks County.

[Leg. Int., Vol. 30, p. 433.]

MARBERGER FOR USE, ETC., *vs.* SPOHN.

A married woman cannot be legally clothed with the title to land, when she has the control of no means and no credit which are exclusive of her husband's rights.

Rule for payment of balance of fund raised by sale of real estate to Joseph Reber, and rule for payment of said balance to Rebecca Spohn.

WOODWARD, P. J.—The property out of which the fund in court has been raised was conveyed by Samuel Marberger to Rebecca Spohn, on the 27th of March, 1868. The sum of \$150 was paid on account of the purchase money, and a mortgage for \$1650, in which her husband joined, was executed by Mrs. Spohn. It is shown by the depositions read on the argument, that the \$150 paid at the time of the conveyance was furnished to her by Mrs. Spohn's sister as a loan, and she states that she still owes her sister the entire amount. There is no proof of any separate estate belonging to her. The whole transaction was an effort to invest a married woman with title to real estate by a series of fresh contracts while she was living with her husband, with no means of any kind which she could have the right exclusively to control. The property having been sold by proceedings under the Marberger mortgage, the balance, after the payment of the purchase money, is claimed respectively by Mrs. Spohn and by Joseph Reber, a judgment creditor of her husband.

The rights of these parties are defined by rules which have been settled by the Supreme Court. The proof contained in the depositions that Mrs. Spohn kept boarders does not help her case, for, notwithstanding the act of the 11th of April, 1848, the husband is still entitled to the labor of his wife and the benefit of her industry and economy. Her earnings and savings, not out of her separate estate, do not become her separate property, but belong to her husband as before the act. *Raybold vs. Raybold*, 8 Harris, 308. "Where a married woman claims property in opposition to her husband's creditors, which has been purchased since the marriage, she must show affirmatively that she has received money or other property 'by will, descent, conveyance, or otherwise,' and invested it in the property claimed." *Walker vs. Ram-*

sey, 12 Casey, 410. "She must prove her ownership by clear and satisfactory evidence." *Rhoads vs. Gordon*, 2 Wr. 277. "She must clearly show that the purchase money was her own, in some way, within the recognition of the act of 1848, for the law presumes it to have belonged to her husband." *Hoffman vs. Toner*, 13 Wr. 931. "To bring the property of a married woman within the protection of the act of 1848, it is necessary to prove that she owns it, as being hers before marriage, or that she acquired it afterward, and in what way. Mere evidence that she purchased it, is not sufficient to give her title—it must be satisfactorily shown that it was paid for with her own separate funds. In the absence of such evidence, the presumption is violent that the husband furnished the means of payment. No mere agreement between husband and wife, whether written or verbal, will avail against creditors of the husband, without proof that the property belonged to the wife independently of agreement between themselves." *Keeney vs. Good*, 9 Har. 340. The claim of Mrs. Spohn is in no way strengthened by the proof that the \$150 paid for the property at the time of the purchase were furnished by her sister. That was a loan. The language of Mrs. Spohn herself, in her deposition, is: "I owe my sister yet the \$150." In *Robinson vs. Wallace*, 3 Wright, 129, it was decided that goods purchased by a married woman on her own credit, and used as stock in trade by her, were not her separate property within the meaning and spirit of the act of 1848. In entering judgment in that case, the Supreme Court said: "When the husband knows of and assents to the wife's purchase, no matter what she does with them afterwards, he is answerable on her contract for them. How can it be said that such goods are obtained by, or result from, the wife's property, and are to be protected by the act? Her credit is nothing in the eyes of the law, outside of the special cases in which it is allowed to be pledged. It is esteemed his credit, and the necessary corollary from this legal position is that the fruits of it are his." In *Curry vs. Bott*, 3 P. F. S. 400, a vendor had conveyed land to a wife for the consideration of \$300, for which he took her note; he received about \$80 on the note, and gave it up to her. This was held to be a purchase and not a gift of the land, and it became the property of the husband without clear and satisfactory proof of a separate estate in the wife, which was applied to the payment of the consideration. It was held, also, that her note, without a separate estate devoted to its payment, was not sufficient to give her the title, the presumption being that it was to be paid by the husband.

The whole claim of Mrs. Spohn is against the policy of the law, and in contravention of settled and unquestioned rules. Any effort to clothe a woman with title to land when she has the control of no means and no credit, which are exclusive of her husband's rights, must always, as against creditors, be a fruitless labor until an organic change shall be made both in our legal and our social systems.

The rule to show cause on behalf of Joseph Reber is made absolute.
The rule on behalf of Rebecca Spohn is discharged.

Court of Common Pleas of Luzerne County.

[Leg. Int., Vol. 30, p. 433.]

HABERSTROH vs. TOBY.

1. The holding of an inquisition upon real estate levied under a *feri facias*, is a judicial act involving the exercise of judgment and discretion. The sheriff must, therefore, perform it himself; it cannot be done by his deputy.

Exceptions to inquisition. Opinion delivered November 24, 1873, by HARDING, P. J.—A single question is raised by this case. Can a deputy sheriff hold an inquisition upon real estate, levied under a *feri facias*?

The forty-fourth section of the act of 16th of June, 1836, authorizing the levy, makes it the duty of the sheriff "to summon an inquest for the purpose of ascertaining whether the rents and profits of such estate, beyond all reprises, will be sufficient to satisfy, within seven years, the judgment upon which such execution was issued, with the interest and costs of suit; and he shall further make a return, in due form of law, of the inquisition so taken, to the court, with the writ."

In *Conniff vs. Doyle*, 8 Phila. 633, it was said that when a writ of *feri facias* was placed in the hands of the sheriff, it was his duty to follow the directions of the statute in all that relates to its execution; that there was no middle ground; that he must carry out the law, otherwise there will be no validity in his acts. This proposition is altogether correct; but, still, there is a multitude of duties connected with the office of sheriff, which may as well be discharged by a deputy, as by a sheriff himself. The distinction may be stated thus: All acts of a sheriff involving the exercise of judgment and discretion, are judicial in their character, and cannot be deputed to another.

We are not now sitting to inquire how long the usages about the sheriff's office pertaining to inquisitions have been in existence, nor is it material how many sheriffs have conformed to them: we are here to determine whether this particular inquisition must stand or fall. What, then, were the facts connected with the taking of it? Mr. Louder, the deputy-sheriff, deposes that he held the inquisition; that the sheriff was not present, but was at his residence, sick, in bed; that the jury were sworn by a justice of the peace; and that, after they were discharged, he took this, together with other inquisitions, likewise held by him, to the sheriff, who thereupon attached his signature to them severally. This was despatching business certainly; but it was in a way not warranted by the law. The holding of an inquisition upon real estate levied under a *feri facias* is a judicial act, requiring judgment and discretion. The sheriff must, therefore, perform it himself; it cannot be done by his deputy.

In the case of the *Pennsylvania Railroad Company vs. Heister*, 8 Barr, 445, where damages consequent upon the building of the railroad were to be assessed, it was held, that, under an act which directs a precept to be issued to the sheriff, commanding him to summon a jury, it was irregular for the sheriff to select a jury from a list of names prepared

by his deputy. And in *McMullin vs. Orr*, 8 Phila. 342, it was also held that the selection of a jury by the sheriff in a proceeding to obtain possession before two aldermen, was a judicial act, which could not be performed by a deputy.

Again in *Davis' Estate*, 1 Luz. Leg. Reg. 399, this language was used: "The Orphans' Court looks to a compliance with her decrees strictly in matters pertaining to the distribution of the estates of decedents; and hence, any delegation of powers material in the discharge of the functions of the sheriff and the jury, who alone are contemplated in the precept, is unauthorized, and will not be sanctioned by the court."

Inquisition set aside.

George B. Kulp, Esq., for exceptions.

D. R. Randall, Esq., contra.

Court of Common Pleas of Bedford County.

[Leg. Int., Vol. 29, p. 117.]

MACCABE et al. vs. BLYMYRE.

A sale in Maryland, of personal property by chattel mortgage, duly recorded, is valid against all persons without delivery of possession.

The rule of the common law prevails in Pennsylvania, by which a sale of personal property, unaccompanied by delivery of possession, is void as against the intervening rights of creditors and purchasers.

Between the parties to such Maryland chattel mortgage, a Pennsylvania court would enforce its validity.

But where the mortgagee permits the mortgagor to retain possession of the property, and bring it into Pennsylvania and sell it to a *bona fide* purchaser, he loses all right to the property.

Opinion delivered *March 8, 1872*, by

HALL, P. J.—This was an action of replevin for a horse, and has been converted by the counsel into a case stated for the opinion of the court on the law.

De Lacy, a resident of Maryland, being the owner of the horse and having it in his actual possession, in July, 1870, executed to the plaintiffs a chattel mortgage of the horse, at Cumberland, Maryland. The mortgage was duly recorded, and De Lacy retained possession of the horse.

On the 9th day of August following, De Lacy, who called himself a doctor, came to Bedford with the horse, and opened an office for the practice of medicine.

On the 21st of September following, De Lacy sold his carriage and horses (the horse in suit being one) to the defendant, Blymyre, who paid for the same and took them into his possession. The defendant had no knowledge of the existence of the mortgage.

On the 31st of December following, the plaintiffs issued the replevin.

The question submitted to the court is, whether the Maryland chattel mortgage is valid against personal property retained in possession by the mortgagor, and subsequently brought into Pennsylvania and sold here to an innocent purchaser?

By the statute law of Maryland, a sale of personal property by chattel mortgage duly recorded is valid against all persons, without delivery of possession.

By the common law, a sale of personal property unaccompanied by delivery of possession, is void as to the intervening rights of creditors or purchasers. And this is the law of Pennsylvania.

The laws of the two States being in collision, the question arises, which is to govern?

By the comity of nations, as a general rule, a contract valid where it is made, is valid everywhere, and the law of the place of the contract controls as to the construction of it. Without this rule, there could not safely be commercial or business intercourse between citizens of different nations. But the laws of a nation or State have not, *ex propria vigore*, any binding force beyond the limits of its territory. Any effect they have is *ex comitate*. And the judicial tribunal in Pennsylvania must determine how far comity is to be permitted to interfere with the domestic interests and policy of the State.

As between the parties to the chattel mortgage, Pennsylvania courts could safely enforce the validity of the mortgage, and would do so. There would be no public interest or policy of law that would require us to hold the bill of sale, or mortgage void, *as between the parties to it*, for want of delivery of possession of the chattel.

But it would be an extraordinary stretch of comity that would induce a court here to hold that the Maryland chattel mortgage shall be made the means of *defrauding* our own citizens. Either the *lex rei sitae* must prevail over the *lex loci contractus*, or we must open a wide door for fraud, to the detriment of citizens on both sides of the border. Would it be reasonable to require that the defendant should have first ascertained where this migratory doctor came from, and then have had the records of all the counties in Maryland searched for chattel mortgages? Or is it fairer to hold that the plaintiffs, by allowing De Lacy to retain possession of the horse and bring it into Pennsylvania and exercise notorious acts of ownership, lost their rights under the mortgage as against an intervening Pennsylvania creditor or purchaser?

No people are bound to enforce a contract in contravention of their public law and policy. Whilst a lien created by the *lex loci* will generally be enforced wherever the property may be found, yet this is not necessarily so in preference to claims arising under the *lex rei sitae*. 5 Cranch. 289; 12 Wheat. 361.

The comity extended to the *lex loci* must yield to the positive law and public interests of the place where the remedy is sought. Story's Conflict of Laws, sec. 244, *et seq.*; 2 Kent's Com. 458.

The exercise of comity in admitting or restraining the application of the *lex loci* must unavoidably rest in sound judicial discretion, dictated by the circumstances of the case. Story's Conflict of Laws, sec. 28; *Blanchard vs. Russell*, 13 Mass. 6; *Commonwealth vs. Aves*, 13 Pick. 193.

We direct judgment to be entered for the defendant *pro retorno habendo*.

Messrs. Spang and King, for plaintiffs.

Messrs. Russell and Longenecker, for the defendants.

Court of Common Pleas of Crawford County.

[Leg. Int., Vol. 29, p. 117.]

PEIRPONT EDWARDS vs. MARY EDWARDS.

The causes of divorce must be "particularly and specially" set forth in the libel--the averments of desertion and cruelty should be in the words of the act of assembly.

Libel for a divorce. Opinion by

LOWRIE, P. J.—We cannot sustain this libel. The defendant was served with process, but does not appear and took no part in the examination of witnesses. The libel charges the defendant with adultery, desertion, and offering grievous indignities to the plaintiff's person.

The charge of desertion is not sufficiently laid, because it avers only that "she has withdrawn from his house and family," whereas it ought to have averred "wilful and malicious desertion." These two expressions are not at all equivalent; the withdrawal charged is not charged as unlawful, and it may have been for good reasons. Besides, it took place only last June; it is therefore not relied on; but it ought not to have been inserted in the libel.

The charge of adultery is not sustained, either generally or in relation to the person named as *particeps*. The wife told her husband that she had committed adultery, but did not say with whom. This, by itself, is of no value as evidence of the fact, else parties would readily divorce themselves, to use an expression of Woodward, J., 11 Harris, 345, by talking loose the conjugal bond. There would be no restraint upon collusion if this should be allowed, 9 Watts, 339; 1 Mass. 340; 2 Id. 1543; Greenleaf, 398; at least without the aid of corroborating evidence; 6 Barr, 337; 11 Pick. 461; and it is much worse when the confession is proved only by the oath of the other party.

There is no corroboration here; for her going away from home with a man, or living in the oil regions, or that she said she wished to live with other men, or even that she has a reputation for unchastity, 5 N. H. 195, if this were shown, or all of them, do not cast any light on her admission, and they may have all taken place since the admission, and they may all be true without her being guilty of adultery. And besides this, we are very reluctant to approve a general charge of adultery without a specification setting forth the time when and the persons with whom the adultery was committed. The law requires the causes to be "particularly and specially set forth in the libel;" and this requisition ought, perhaps, to be insisted on by the court where the defendant does not appear; 6 Casey, 412; 4 Yeates, 244; 8 Conn. 166; 16 Pick. 254; and the evidence must prove the charges as laid in the libel and specification. Yet a general charge of each cause of divorce, in the form given by the law, is always deemed sufficient where the defendant appears, for then each party can call for a specification. 13 P. F. Smith, 450; 14 Id. 470.

The charge of cruelty is not sustained. It avers that she has offered such indignities to his person as to render his condition intolerable and his life burdensome, and that he is safe neither in property nor person; whereas it ought to have averred, with proper specification of times and

places, that she had by "cruel and barbarous treatment rendered his condition intolerable and life burdensome." This is the standard given by the act of assembly, and as we judge by it, libels had better be drawn by it.

And then this "cruel and barbarous treatment" ought to have been clearly proved by acts, with their times, places and circumstances given, so that it might be seen to be of the kind and degree which the law requires; equivalent to the *sævitia* of the Roman law; 3 Mass. 321; 2 Id. 150; 4 Id. 587; or at least to our own definition of it as "actual personal violence, or the reasonable apprehension of it, or such a course of treatment as endangers life or health, and renders cohabitation unsafe;" 12 Wright, 238; and not mere want of sympathy, disagreeable manners, ebullitions of ill temper, or habitual disregard of feelings. 11 Harris, 160; not even loose and immoral conduct, and ungovernable temper, causing her to commit acts of violence on his person, destroying the peace and comfort of his family and rendering his condition intolerable, and life burdensome. 12 Wright, 227, 237.

The testimony tells us of her faults, but in no case are the circumstances narrated under which they arose. The plaintiff testifies that she was always cruel to him, and this may have been mere want of sympathy, or the collision of a shrinking and timid nature with a rougher one, neither of which knew how to deal with the other for their common good; *that she often swore at him*, but nobody else testifies of this, and his sister, who lived with him all the time, never heard it; *that she threatened to poison him, to kill him, to burn his property*, but we know not how this came about, and it may have been mere ebullition of ill temper, or her form of scolding; she never did him any harm. The plaintiff's sister testified also of her scolding and her threats, and that she would be revenged on them both; she did not like the sister being in the house. This is not seldom a cause of alienation between husband and wife. The other witnesses know nothing of this family quarrel.

Surely this is not such evidence as can justify us in decreeing a divorce. We observe, moreover, that there is no evidence that the defendant was notified of the taking of the depositions, though it appears that she is not far off. It seems that a rule of court authorizes this; but I fear the rule is wrong, and that a proper effort ought to have been made to notify her, and if it failed, that the court ought to have been applied to to give direction for a proper substitute for personal notice. This deserves further consideration. But without this the case fails because of the insufficiency of the libel and of the evidence.

And thereupon the libellant had leave to withdraw his libel on payment of costs.

Court of Common Pleas of Northumberland County.

[Leg. Int., Vol. 29, p. 197.]

RUNKEL *et al.* vs. PHILLIPS *et al.*

The judgment recovered against a surviving partner is not evidence against the representatives of the deceased partner, *for they were no parties to it.*

In actions by or against the surviving partner, the adverse party is a competent witness under the act of 1869; the representatives of the deceased partner not being parties to the action are not bound by it, nor can the estate of such deceased partner be in any way affected by the judgment, either for good or for ill.

Motion for a new trial. Opinion delivered June 17, 1872, by

ROCKEFELLER, P. J.—On the trial of this cause, Charles Baker, one of the defendants, was called by the defendants and objected to “because the witness was incompetent to testify in the cause for the reason that he is precluded from being a witness by the act of 1869, allowing parties in interest to be witnesses in their own cause, one of the members of the firm of which plaintiffs are surviving partners being deceased.” The court admitted the witness and the plaintiffs excepted. The ground on which we are now asked to grant a new trial is the admission of this testimony. At the time of the trial I had some doubts as to whether I was not adhering to the letter of the act and rejecting the reason and spirit of the provision, “that the act shall not apply to actions by or against executors, administrators or guardians, nor where the assignor of the thing or contract in action may be dead,” etc. In the case of *McBride's Appeal*, reported in the Leg. Int., vol. 29, p. 12, Mr. Justice Williams says, “manifestly it was not the purpose of the act to open the lips of one party while those of the other were closed.” And says, “this is abundantly evident,” from the provision above recited.

If this was a suit by or against the executors or administrators of Dr. McCleary, or if it was any kind of a proceeding at law or equity by which his estate could be affected, or in any way bound, I would not hesitate to say that an error was committed in receiving the testimony of this witness, but as the suit now stands it is an action between John Runkel and Charles A. Newhart, surviving partners of the firm of which the doctor was a member, and the defendants. The jury was sworn as to these parties alone. The executors or administrators of Dr. McCleary are not parties, and are not bound by the judgment. No execution can issue against his estate, and the judgment is not evidence, and cannot be used by these surviving partners to enforce contribution against his estate. This doctrine, I think, is fully recognized in the case of *Moore's Appeal*, 10 Casey, 411. The syllabus of that case is as follows: “The judgment recovered against the surviving partner, *it seems*, is not evidence against the representatives of the deceased partner, *for they were no parties to it.*” An examination of that case will show that Judge Lowrie had no doubt in his mind on that question.

Being of opinion that Dr. McCleary's estate cannot be affected by this judgment, either for good or for ill, it follows that the witness was properly admitted under the act of 1869, and the motion for a new trial is overruled.

Court of Common Pleas of Delaware County.

[Leg. Int., Vol. 29, p. 157.]

ASSIGNED ESTATE OF "THE REANY ENGINEERS AND SHIP BUILDING WORKS."

1. In the absence of contract, the *builders* of a vessel, furnishing material, are its *owners*; the law casts the ownership upon them.
- 2 The result may be varied by contract. The *builder* may waive the benefit of his position as respects *himself*. But if his secret waiver of this right may deprive the materialmen and mechanics of the privilege of treating him as owner, and thus defeat their liens, the act of assembly (13th June, 1836, sec. 1, Purdon's Digest, p. 62) would seem to be a delusion.
3. In a contract for building a ship occurred the following provisions: "All payments made by the party of the second part (for whom the vessel was to be constructed) shall be considered as constituting ownership of ship so far as advanced." *Held*, that the language, "so far as advanced," had reference to payments in advance of delivery, and did not relate to the vessel, nor transfer the ownership so far as the structure was completed.

Sur exceptions to report of A. Lewis Smith, Esq., auditor. Opinion delivered *April 26, 1872*, by

BUTLER, P. J.—Jacob Lorillard, a general creditor of the assignors, complains that the auditor has found that certain other creditors, who furnished material for vessel No. 118, are entitled to liens upon it; and therefore to a preference in the distribution of the proceeds of sale.

Mallory & Co., for whom the vessel was built, do not object, and probably have no interest in the controversy.

The case turns upon the question of the ownership of the vessel. If this was in Mallory & Co., no liens attached. The material was furnished to the *builders*, and it is necessary that they shall have been the *owners*, to bring the case within the act of assembly.

But in the absence of contract, the builders of a vessel, furnishing material, are its owners; the law casts the ownership upon them. The cases do not leave this in doubt. *Low vs. Austin*, 20 N. Y. 181. And the parties here so understood it, as their acts demonstrate.

The result may be varied by contract. The builder may waive the benefit of his position as respects *himself*.

There is no doubt of this. But may he do so as respects others—and thus affect those who have dealt with him on the faith of it, and in ignorance of his acts?

The act of assembly was designed for the protection of a meritorious class of creditors, material men and mechanics, whose property and labor create the vessel.

It requires that they shall deal with the owner or master. But the builder who provides material, as we have seen (without more appearing) is the owner. If his secret waiver of this right may deprive the materialmen and mechanics of the privilege of treating him as owner and thus defeat their liens, the act of assembly would seem to be a delusion. In every instance its purposes may be defeated.

In the case before us, those claiming liens saw the Reany Company constructing a vessel and providing the necessary material. They did not know for whom it was designed; it was not their business to ascertain; nor was it within their power to do so.

They knew that without more appearing than they saw, or could ascertain, the *builders* were the *owners*, and that they could therefore deal with them with safety. But when trouble comes, another party appears and claiming that the builders have waived the benefit of their position—the right of ownership—asserts that the material and labor were not furnished at the instance of the *owner*, that no liens consequently exist; and that the vessel, which their property and labor has created, he—this party before unheard of—may carry off, while they go unpaid. Such a result as is here contemplated would, in our judgment, be a fraud on the act of assembly.

The very intelligent counsel for the exceptor has referred us to three cases which he thinks sustains his position. *Hubbell vs. Dennison*, 20 Wend. 181; *Andrews vs. Durant*, 1 Kernan, 35; *Hiscox vs. Harbeck*, 2 Bosworth, 506. The first two simply assert the general principle, that the builder may stipulate against the legal consequences of his position as respects *himself*.

In the last it certainly is held that such a waiver or transfer will defeat the rights of the materialmen and mechanics, under an act of assembly similar to our own.

But it is very remarkable that the case is put exclusively on the authority of *Andrews vs. Durant*, in which, as we have seen, the question did not arise—no *creditor* being involved—and in which it was not even necessary to assert the doctrine as between *parties* to the contract, for the ownership was decided to be in the *builders*. Neither this important distinction (between *Andrews vs. Durant* and the case then in hand) nor the fact that the creditors in the latter case were *without notice*, nor the effect of such ruling upon the statute, are commented upon or even alluded to. The case is treated in all respects precisely as if it was between the parties to the agreement, and as if the only question was whether the builder may waive the legal advantages of his position as respects *himself*.

Under the circumstances we could not follow this case. A careful examination has not enabled us to find any other like it.

But we do find that in *Smith vs. The Railroad Company*, 1 Curtis, C. C. R. 253; and in *Ladd vs. Hughes*, 16 Illinois R. 41, the absence or presence of notice of the terms of a special contract, between the employer and builder of a vessel, is important in determining the rights of materialmen and mechanics to liens.

But granting to such a contract the effect claimed for it by the exceptor, *did* the parties so contract in this instance? They provided that "all payments made by the party of the second part shall be considered as constituting ownership of ship so far as advanced."

It is urged that the language, "so far as advanced," relates to the *vessel* and transferred the ownership so far as the structure was completed; that it cannot relate to the *payments*, because they were not intended to be *advanced*, but to be made when due.

But if it was the design of the parties to vest the entire ownership of the vessel in Mallory & Co., while in process of construction, would they not have chosen a shorter and simpler method of expressing it? As for instance: "the ownership from the beginning," or "while the vessel is in process of construction, shall be in the party of the second part."

And why use the words "so far as advanced" at all? They *add* nothing whatever in this view. And why refer to the *payments* in this connection, if such was the intention? It was wholly unnecessary. But particularly, why use the term "*all payments*;" if *each* was not to effect the ownership, and define its extent?

To us it seems quite plain that the parties designed that each payment should transfer the ownership to that extent; and that the language, "so far as advanced," had reference to payment in advance of delivery.

It is urged that this construction would not protect Mallory & Co.; that if an interest remained in the builders, and liens attached, they would extend to the entire vessel and transfer the whole of it. We need not stop to consider whether such would or would not be the effect of a joint ownership.

All that Mallory & Co. can claim in any event, is the benefit of their *contract*. If this is too narrow to protect them, they must abide by the result.

But the argument overlooks the fact that the contract *expressly* creates a joint ownership, by providing that the builders shall remain interested to the extent of one-sixteenth after delivery. The inference that the parties did not intend a joint ownership, with its consequences, is thus entirely excluded.

The acceptance of the builder's notes was not a waiver of the right to liens. Under the decisions in this State in analogous cases, the presumption is, that the notes were *collateral*. In the case of *The St. Lawrence*, 1 Black, (N. S.) 522, however, the precise point is decided.

The conclusions reached by the auditor pays the lien creditors in full, and is therefore satisfactory, except to the extent embraced in the last exception. It is due to the intelligent auditor to say, that his attention was not called to the matter here complained of until the report had passed from his hands.

The error is not accurately described by the exception. The auditor has given to the *general* claims of the lien creditors an advantage over *other general* claims. This was unintentional, and the error is admitted. Unless the parties can agree upon an amended table of distribution we will refer the report back for correction in this respect.

All other exceptions are dismissed.

Morton P. Henry, Esq., for exceptor.

Carroll S. Tyson, Thomas H. Speakman, and Joseph B. Townsend, Esqs.,
contra.

Court of Quarter Sessions of Venango County.

[Leg. Int., Vol. 29, p. 53.]

COMMONWEALTH vs. CURREN.

1. The liability of the county or the prosecutor to costs in criminal cases, is entirely statutory and did not exist at common law.
2. The boarding of prisoners is a public charge on the county and is not recoverable from prisoner.
3. The liability of defendants, prosecutors and the county for costs considered.
4. Of the discharge of prisoners under the act of June 16, 1836, section 47 and 58.
5. The discharge of prisoners by the county commissioners—their power considered.

Exceptions to costs. Opinion delivered by

TRUNKY, P. J.—In disposing of this case it is necessary to note the distinction between costs, which are an allowance to a party, and fees, which are a compensation to an officer. As will readily be seen by a glance at the various statutes, both are frequently included under the term costs. Recently a number of questions as to the liability of prosecutors, and defendants, and convicts, and the county, to pay costs in criminal cases, have been submitted for decision, and, by request, for information of those interested, the views of the court will be given on all these, though all are not involved in the pending exceptions.

1. By the common law the crown neither paid nor received costs. Defendants had to bear their own expenses, and even pay costs, whether found guilty or not guilty. It frequently happened that defendants were detained, on account of fees alleged to be due to the jailer, after their acquittal. The prosecutor was not liable to pay costs in any case, for the prosecution was in the name of the crown. When the case was ended an innocent defendant could seek redress by action for malicious prosecution. This is the law brought to the colony of Pennsylvania; and is in force to this day where it has not been supplied by legislation. A jury cannot make the county, or a prosecutor, pay costs, except by virtue of a statute. A defendant must pay costs and the jailer's charges, unless relieved by statute. The Commonwealth, nor the county, never pays costs when not required to do so by statute. 1 Chit. Cr. L. 649; Ibid. 829; *Irwin vs. Northumberland county*, 1 S. & R. 505; *Commonwealth vs. Tilghman*, 4 S. & R. 127. In England the defects and hardships of the common law relative to costs and jailer's charges are now corrected by acts of parliament; these are not in force in Pennsylvania.

2. Is the county liable for keeping prisoners while confined in jail? Under the common law great abuses and grievous extortions were practised by jailers upon prisoners in both debtor and criminal apartments. The attention of the law makers was called to this more than a hundred and fifty years ago. From time to time acts were passed to protect poor and unfortunate debtors—the present inquiry is solely in reference to persons charged with crime, and convicts. By act of 1705, 1 Smith's L. 56, it is enacted, that the respective prisons of each county shall be work-houses until others are provided; "and prisoners shall have liberty to provide themselves with bedding, food and other necessities, during

their imprisonment ;" " and that the public allowance shall be two pence per day and no more." The act of February 24, 1770, 2 Smith's L. 309, after reciting that doubts had arisen whether the allowance should be paid after conviction, reads: " for the removal of which doubts, *Be it enacted*, That all persons committed for any criminal offence whatsoever, shall, during their imprisonment, have and receive three pence *per diem* each ; and that the commissioners of and for each respective county, within this province, shall pay the same to the sheriffs of their respective counties, for the diet and support of such criminals as shall be within their gaols respectively, out of the county stock which shall from time to time be raised and levied for the payment of the county debts, any usage or custom to the contrary notwithstanding."

The act of April 5, 1790, Pur. Dig. 502, provides for the employment and support of malefactors sentenced to hard labor in the several counties of the Commonwealth. Food and clothing to be furnished at the charge of the proper county. The act of April 11, 1856, provides, " that the sheriffs of the several counties of this Commonwealth, excepting the counties of Allegheny and Philadelphia, to whom are committed the custody of prisoners, shall hereafter receive such allowance for boarding said prisoners as may be fixed by the Courts of Quarter Sessions of the respective counties, not exceeding twenty-five cents per day for each person." This is the latest general law relating to boarding of prisoners ; however, there are recent local laws not quite so numerous as the counties of the State, for, in a few instances, two or more counties are embraced in the same act. Some of these local laws fix a certain amount to be paid ; as for Venango county, it is enacted, by act of May 5, 1864, " that hereafter, and including the present year, the sheriff of said county shall receive as compensation for boarding and lodging all prisoners, which by law the county is now required to pay, at the rate of two dollars per week." In other counties other sums are fixed ; in others the judges of the courts and county commissioners fix the amount ; in others, including Mercer, act of March 16, 1866, the Courts of Quarter Sessions fix the daily allowance.

An examination of the acts cited shows, that the amount allowed for boarding prisoners is a public charge, to be paid by the county ; and in none of the acts is there any provision that the county may recover the same from the prisoner. When we call to mind some of the incidents attending the common law system, such as that a poor and innocent man could be detained in prison for non-payment of his jail fees, as well as the costs of his trial and acquittal ; the making a man pay for his subsistence while imprisoned and awaiting trial, which would take place almost at the pleasure of his sovereign, whether king or State ; and in many instances the prisoners smarting from the unfeeling and greedy exactions of rapacious jailers ; it is not surprising that in Pennsylvania, as in England, modern legislation provides for the public support of those criminally charged, or convicted, during their imprisonment. If the public officers neglect to provide suitable jails or work-houses for the employment of those who may be sentenced to imprisonment at labor, and hence the prisoners are idle, this is no reason for withholding the public allowance, or attempting to exact its payment from the prisoners in violation of law.

3. Liability of prosecutor, and defendant, and county, for costs.

The act of September 23, 1791, is the first legislation I have noticed relative to costs on indictments. It provided that the county should pay the costs on bills returned ignoramus; also the expenses of removal from one county to another; also the costs on conviction for offences punished capitally, or by imprisonment at labor when the defendant had no property. The next is the act of March 20, 1797, which recites: "Whereas, by the existing laws a party acquitted is equally liable to costs of prosecution as if he were convicted, which operates injustice and a punishment to the innocent;" and, for a remedy, enacts, that on acquittal of a party for any indictable offence the county shall pay the costs. The act of December 8, 1804, modified the foregoing and provided that on all indictments, except felony, if ignored, the grand jury should return whether the county or prosecutor should pay the costs, and upon trial and acquittal by the petit jury, that they should find whether the county, prosecutor or defendant should pay the costs. And the act of March 28, 1814, provided that a convicted party should pay all costs, but if legally discharged without payment, the same should be paid by the county. The parts referred to of the foregoing acts were repealed by the act of 1860, and their provisions consolidated and re-enacted. It is well to refer to these old acts; they show when the common law was changed, and the decisions under them will aid in understanding the consolidated act of 1860.

The prosecutor is liable only in case of misdemeanors, when, if the bill is ignored, the grand jury shall decide and certify that the prosecutor shall pay the costs of prosecution; and when on trial and acquittal of the defendant the petit jury shall render a verdict that the prosecutor shall pay the whole or a part of the costs. He is not then bound to pay till sentence by the court. The court may set aside a verdict so far as it imposes costs upon the prosecutor. If there be no judgment and sentence the prosecutor cannot be compelled to pay. If he is not named in the verdict there can be no sentence. When the verdict is set aside, or when there can be no sentence, or when the jury acquit without any finding as to costs, there can be no recovery from any source of the costs of prosecution or fees of the officers. When the verdict of the petit jury is, that the prosecutor shall pay the costs, the defendant's bill shall be included and paid accordingly.

In all cases of conviction of any crime, the costs shall be paid by the party convicted. In all prosecutions for felony, if the bill be ignored, or defendant acquitted, the defendant pays no costs, but must bear the expenses of his witnesses, and procuring their attendance. In misdemeanors, if acquitted on the trial, the jury may render a verdict that he pay the costs or a portion thereof—if for the costs, all will be taxed against him; if for a portion, he must pay the proportion of costs of prosecution. The act does not provide that a defendant may file his bill when the jury determine the county shall pay the costs; nor when the grand jury ignore a bill and return the county, or the prosecutor, to pay the costs; nor when the petit jury divide the costs in proportions between the prosecutor and defendant; the absence of provision leaves the defendant to bear his own expenses.

In every prosecution for felony, which fails, and in every misdemeanor

when the prosecution fails, and the grand or petit jury so direct, the county is liable for cost of prosecution. The county is also liable to pay the costs in all cases of felony when the defendant, though convicted, has not sufficient means to pay. In no case does the county pay the defendant's costs. When one has been convicted on any indictment, and afterwards discharged according to law, without payment of costs of prosecution, the same shall be paid by the county. This effect by discharge is only when the party was convicted. The county is not liable to pay costs in any event where a bill is ignored, and prosecutor returned for costs; nor where the verdict is not guilty, and prosecutor to pay the costs; nor upon like verdict, and defendant to pay the costs; nor when the costs are divided between the prosecutor and defendant; nor when the case is terminated by *nolle prosequi*; nor when the indictment is quashed; and in any of these cases, upon the party being legally discharged and without means, those entitled to the costs have no remedy for the collection. *Commonwealth vs. Philadelphia county*, 4 S. & R. 541; *Berks county vs. Pile*, 6 Har. 493; *Commonwealth vs. Huntingdon county*, 3 R. 487.

The fifteenth section act of September 23, 1791, providing that, where several indictments are brought against a defendant at the same sessions, the county shall pay the costs in one only, is repealed by the act of 1860. It is scarcely necessary to say, that notwithstanding this repeal, that witnesses are only entitled to mileage and daily pay as if attending in one case; and when subpoenaed and called by the Commonwealth in a number of cases, they cannot be allowed costs in each case. A witness is entitled to one compensation, and no more, as fixed by the fee bill for attendance at one term.

Section 13, act of September 23, 1791, provides that, "where any person shall be brought before a court, justice of the peace, or other magistrate of any city or county of this Commonwealth, having jurisdiction in the case, on the charge of being a runaway servant or slave, or of having committed a crime, and such charge, upon examination, shall appear to be unfounded, no costs shall be paid by such innocent person, but the same shall be chargeable to and paid out of the county stock, by such city or county." This act refers to all crimes. The word crime is used in its general sense, just as it is in the 64th section of criminal procedure act of 1860. It is not synonymous with felony. Blackstone says, crimes and misdemeanors are mere synonymous terms; the former, in common usage, denoting offences of a more atrocious dye, and the latter, smaller faults and offences. A crime or misdemeanor is an act committed or omitted in violation of a public law. Black. Com., vol. 4, p. 5; Webster's Dictionary. Forgery, perjury, and many offences of lower grade, are misdemeanors and within the act; murder, larceny, and other felonies, are crimes, and within the act. It is not intended, by the act, to offer a premium in the shape of payment of costs, to induce magistrates to hold to bail, or commit, a party charged with a crime that is not a felony, and allow them nothing when the accused is discharged.

4. Under the act of June 16, 1836, Pur. Dig. 544, § 58, every person confined in jail for any sum of money or fine, not exceeding fifteen dollars, exclusive of costs, after he has remained in confinement thirty days for the fine, shall be discharged, both as to fine and costs. If part of the

sentence be imprisonment, he must remain in confinement thirty days after the time adjudged for imprisonment. His property is liable for both fine and costs. *Commonwealth vs. Long*, 5 Binn. 489. If the costs do not exceed \$15, the defendant or prosecutor, committed for non-payment, may be discharged after a confinement for thirty days, and this, although he may be committed on several bills, amounting in the aggregate to over \$15, provided the costs on each does not exceed that sum. *Commonwealth vs. Blair*, Ing. on Ins., 46-7; *Coyle vs. Burt*, 12 Johns. 372.

5. Under section 47, of the act last cited, the Court of Common Pleas has power to discharge a person confined by sentence, in cases therein set forth, upon his making application and conforming to the provisions directed in case of insolvent debtors. Before a prisoner can avail himself of the benefits of this section, he must have remained in prison three months; and, if imprisonment was a part of the sentence, three months after the end of his term of imprisonment. *Feehan's Case*, Bright. R. 462; 25 Leg. Int., July 3, 1868, 213; 7 Phila. 75. By act of July 24, 1849, the defendant, after the three months, may give bond and be released as in civil cases.

6. Some difference of opinion seems to exist, as to the power and duty of county commissioners to discharge persons from imprisonment. We will conclude with extracts from the opinion of the court by C. J. Black, in *Schamble vs. The Sheriff*, 10 Har. 18.

"The commissioners have a right, and it is their duty to manage the financial affairs of the county. They are the guardians of the treasury, and no money can be paid out except on their order. All special contracts for and on behalf of the county are made by them. They must see to the collection of the debts due to the county, and provide the ways and means to meet those which it owes. In the performance of their duties, they have a wide latitude of discretion. They are not bound to sue a debtor of the county from whom they know that nothing can be recovered; and when a prisoner is detained merely for non-payment of costs, even in a criminal case, they may advance the sum necessary to discharge him if they are satisfied that by doing so, money can be saved to the treasury. The last seems like a stretch of power, but it has been sanctioned by the approbation of several eminent judges of this court, though not by any directed adjudication.

"But when a party is convicted of an offence, and adjudged to pay a fine, and committed to jail because he does not, the case goes altogether beyond the jurisdiction of the commissioners. It is then a question of justice not of economy. The commissioners can make no order for the discharge of one who is in jail, in execution of a criminal sentence, without being guilty of a most unauthorized interference with the administration of the criminal law.

"When the judges pronounce their sentence on a convicted offender, it is their duty to consider his pecuniary circumstances. If the fine is greater than he can pay, it must be presumed that the legal term of confinement was meant to be substituted for the money. No matter how poor the convict may be, nor how large the fine, nor how clearly he may demonstrate his inability to pay it, the insolvent laws will not release him until he has passed a certain period in confinement. He must

expiate his offence, either by payment or imprisonment. It sometimes happens that courts misled by false information, or compelled by some unbinding rule of law, inflict punishments which mercy would not enforce. The power to pardon is therefore necessary, but it is vested exclusively in the governor.

"Doubtless a very large amount of money might be saved to the treasury, by not allowing prosecutions to be commenced at all, especially against men who are unable to pay the expense. Yet society must be protected, cost what it will. Economy in the management of public funds is certainly a great virtue, and all the more valuable because it is rare ; but still no matter of mere dollars and cents can be put in competition for a moment with the administration of criminal justice."

I N D E X.

ACCOUNT.

Where a commission merchant rendered an account-sales to his consignor, which was not objected to for six months, and the consignor drew upon the merchant for the proceeds of the sales, also without objection: *Held*, that the account sales thereby became an account stated, and that the consignor could not afterwards maintain an action against the commission merchant for selling contrary to instructions. *Hall vs. Sloan*, 138.

ACTION. See WAY. DECEDENT, 2. ACCOUNT. TRESPASS. LIMITATION OF ACTION.

1. An action of assumpsit against two cannot be maintained on an instrument signed by one. *Norris vs. Mailland*, 7.

2. The unqualified refusal of a party to a contract to perform it when the time arrives, announced before such period, is a breach, and suit may be commenced at once. *Mountjoy vs. Metzger*, 10.

3. An action cannot be sustained by a creditor against one who promises with the original debtor, in consideration of transfer of property, to pay his debts, where the creditor has not given up his original demand, and agreed to look solely to the promisor. *Stone vs. Justice*, 22.

See PRACTICE. *Machette vs. Magee*, 24.

HUSBAND AND WIFE. *Clark and Wife vs. Koch*, 109.

PARTNERSHIP. *Uberoth vs. The Bank*, 83.

ACTS OF ASSEMBLY, considered and construed.

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| 1705, | | REPLEVIN. <i>Taylor vs. Express Company</i> , 272. |
| 1715, | April 15. | RECORDING ACT. <i>Neide vs. Pennypacker</i> , 86. |
| 1718, | } | FEME SOLE TRADERS. <i>Markley vs. Wartman</i> , 236. |
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| 1770, | Feb. 24. | LEASE. <i>Welsh vs. Oates</i> , 154. |
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| 1831, | March 30. | MECHANICS' LIEN. <i>Boyd vs. Mole</i> , 118. <i>Allen vs. Fitzpatrick</i> , 142. |
| 1832, | March 19. | EXECUTORS AND ADMINISTRATORS. <i>Bradley's Estate</i> , 327. <i>Gaul's Estate</i> , 333. |
| 1834, | Feb. 24. | EXECUTORS AND ADMINISTRATORS. <i>McCallion vs. Gegan</i> , 240. <i>Myers' Estate</i> , 310. <i>Bradley's Estate</i> , 327. |
| 1836, | June 16. | EXECUTIONS. <i>Scofield vs. Harbeson</i> , 38. |
| 1840, | Oct. 13. | ORPHANS' COURT. <i>Scofield vs. Harbeson</i> , 38. |
| 1842, | July 12. | IMPRISONMENT FOR DEBT. <i>Hamill vs. Rawlston</i> , 52. <i>Artman vs. Bell</i> , 237. |
| 1843, | April 5. } | INSURANCE COMPANY. <i>Cochran vs. Gowen</i> , 299. <i>Insurance Company vs. Stokes</i> , 80. |
| 1859, | Feb. 10. } | |
| 1843, | April 19. } | MUNICIPAL CLAIMS. <i>City vs. Lea</i> , 106. |
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| 1845, | " 20. | RAILROAD. <i>Railroad Company vs. City</i> , 563. |
| 1846, | April 20. | LIEN CREDITORS. <i>Gordon's Estate</i> , 350. |
| 1848, | March 25. | REPAIRS MEADOW BANK. <i>City vs. Scott</i> , 171. |
| 1849, | Feb. 19. | RAILROAD. <i>Lodge vs. Railroad</i> , 543. |
| " | April 5. | FORGED INDORSEMENT. <i>Bank vs. Chambers</i> , 129. |
| " | " 5. | NUISANCES. <i>Wistar vs. Addicks</i> , 145. |
| " | " 9. | RECORDING. <i>Neide vs. Pennypacker</i> , 86. |
| " | " 10. | BROKERS' LICENSES. <i>Costello vs. Goldbeck</i> , 158. |
| 1850, | April 25. } | FEES. <i>Krause vs. Stiles</i> , 127. |
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- 1854, Feb. 2. }
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 " May 1. EXECUTORS AND ADMINISTRATORS. *Bradley's Estate*, 327.
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 1868, Aug. 1. MECHANICS' LIEN. *Hood vs. Building Association*, 105.
 " " *Crump vs. Gill*, 117. *Amos vs. Clare*, 35.
 1869, April 12. ACTIONS. *McCallion vs. Gegan*, 241.
 " " 15. EVIDENCE. *Sheets vs. Hanbest*, 188.
 " " 17. ATTACHMENT. *Frailey vs. Insurance Company*, 219.
 1869, April 20. PARTITION. *McNickle vs. Henry*, 243.
 1870, " 14. AUDITOR. *Krause vs. Stiles*, 127. *Haugh's Estate*, 329.
 " " 28. CHESTNUT STREET—PHILADELPHIA. *City vs. Board of Publication*, 499.
 " June 6. BOARD OF SURVEY. *Ferree vs. Surveyors*, 518.
 1871, April 8. FOREIGN EXECUTORS. *Williams vs. Railroad*, 298.
 " June 2. GUARDIAN OF POOR. *Comm. vs. Armstrong*, 479.
 " " 15. FAIRMOUNT PARK. *In re Park Damages*, 553.
 1872, March 13. UNION PASS. RAILWAY. *Railway Co. vs. Railway Co.*, 495.
 " May 6. MONUMENT CEMETERY. *Comm. vs. Dickinson*, 561.

ACTS OF CONGRESS, *considered and applied.*

- 1789, Sept. 24. JUDICIARY ACT. *Cambloss vs. Railroad Company*, 411.
 1793, Feb. 18. ENROLMENT OF VESSELS. } *United States vs. Canal Boat*
 1846, July 20. CANAL BOATS. } *Ohio*, 448.
 1864, May 6. TONNAGE MEASUREMENT. }
 1864, June 30. } INTERNAL REVENUE. *Railroad Co. vs. Kenney*, 403.
 1870, July 14. }

ADMIRALTY.

1. A libel will not lie for wharfage, as a maritime lien. *Storage Company vs. The Thomas*, 364.
2. Counsel fees in, allowed as costs, under special circumstances in E. D. of Pennsylvania. *Case of Schooner Wreath*, 467.

AGENT.

1. An agent unfaithful to his principal forfeits his right to his place, whether his principal is damaged or not. *Henderson vs. Hydraulic Works*, 100.
The power of an agent is limited to his employment. *Carson vs. Cochran*, 21.
2. It is an agent's duty to give his principal timely notice of every fact which may make it necessary to take measures for his security. *Moore vs. Thompson*, 164.
3. In a foreign attachment, when the garnishee is the plaintiff and the defendant's agent, he should give him notice of the proceedings. *Id.*
See FIRE INSURANCE. COMMON CARRIER, 3.

APPEAL. See RAILROAD, 1.

1. A transcript will not be struck off on motion. *Engard vs. O'Brien*, 559.
2. The court will not extend the right to filing appeals from aldermen *nunc pro tunc*, beyond what has already been allowed. *Kerr vs. Rodgers*, 525.
3. Defendant having been served and judgment recovered against him before an alderman during his absence from the city, in order to have a rehearing he must proceed according to section 7 of the act of March 20, 1810. *Haines vs. Hillary*, 526.
4. Application to file appeal *nunc pro tunc* refused. *Nutz vs. Barton*, 526.

ALDERMAN.

1. An alderman, taking other or greater fees than are allowed by the fee bill, is guilty of an indictable offence. *Commonwealth vs. Hagan*, 574.
2. A judgment of an alderman for the penalty for "violating the first and second sections of the act of assembly, passed February 25, 1855," will not be sustained. *Commonwealth vs. Finkheimer*, 504.
3. The record of the alderman must show that there was some evidence of the acts constituting the offence. *Id.*

ARCHITECT. See CITY OF PHILADELPHIA, 15.

ATTACHMENT EXECUTION. See GARNISHEE.

1. Judgment for want of an affidavit of defence cannot be entered against a defendant in an attachment execution. *Carter vs. Wallace*, 221.
2. The pendency of an attachment execution is no cause for suspending proceedings by the legal holder of the debt. *Patterson vs. Hawkins*, 105.

ATTACHMENT, FOREIGN.

The defendant may testify as to the value of the goods in the garnishee's hands. *Moore vs. Thompson*, 164.

ATTORNEY-AT-LAW.

1. A purchase by the attorney-at-law of the plaintiff in a judgment, of property sold under such judgment, for a price less than its amount, constitutes the attorney the implied trustee of his client. *Barrett vs. Bamber*, 202.
 2. This state of the record is constructive notice to the attorney's vendee, and fixes him also with the implied trust. *Id.*
 3. Such a trust is barred by the five years' limitation act of 1856. *Id.*
 4. The court will not punish for contempt when the act has not been committed in their presence and there is another mode of punishment. *In re Hirst and Ingersoll*, 216.
 5. Where an attorney undertakes to obtain bail for his client he will be held responsible for any fraud or deception on the court in obtaining and justifying the bail. *Id.*
 6. An attorney cannot be compelled to disclose statements made to him by his client. *Hill's Estate*, 353.
- See ADMIRALTY, 2.

AUCTIONEER.

Under the acts of April 9, 1859, and April 2, 1822, regulating the commissions of auctioneers in the city of Philadelphia, such auctioneers, although commissioned for one year, are authorized to continue the business from year to year under the same commission, paying to the State Treasurer annually a like sum to that paid on obtaining the commission, and they are required to renew their bonds and sureties at the end of every three years. Where, therefore, such an auctioneer having given a bond with sureties conditioned for the faithful performance of his duties during the period he should act as auctioneer under the commission granted to him, continued to carry on the business of an auctioneer after the first year: *Held*, that his sureties were liable on their bond for a breach of his duty occurring after the first year and before the expiration of the three years. *Comm. vs. Daly*, 67.

AUDITA QUERELA.

1. *Audita querela* may be issued after refusal of summary relief on motion. *Emery vs. Patton*, 125.
2. It is a writ of right, but lies only for matters occurring after judgment, or which the party has not had opportunity of pleading. *Id.*
3. It will not lie to show that a judgment confessed was to be collateral security only. *Id.*
4. It is not a *supersedeas* of plaintiff's execution, unless so allowed, and the court will not make such order, unless justice require it. *Id.*

AUDITOR. See ISSUE. MORTGAGE BONDS, 11.

1. Auditors must comply with the act of assembly and rules of court in fixing their fees. *Myers' Estate*, 310.
2. An auditor can only charge the amount allowed by the act of 1870, unless his fee is agreed to by the counsel of all the parties in interest or is fixed by the court. *Haugh's Estate*, 329.
3. The mode in which an auditor may obtain an allowance of an extra compensation under the act of April 14, 1870. *Krause vs. Stiles*, 127.

AUDITOR—(Continued.)

4. The act of April 14, 1870, regulating fees of auditors, must be strictly observed. *Ward's Estate*, 332.
5. An Orphans' Court auditor cannot take notice of an attachment of a legacy. *Jane Campbell's Estate*, 346.
6. An auditor may retain vouchers of an account until filing of his report, and may attach them to his report in filing the same. *Hutchinson's Estate*, 322.
7. Accountant has the right to come into court and ask that they be detached. *Id.*

BOND.

In an action on a bond for \$1481.50, conditioned that the defendant should improve a certain lot by a specified time and in a certain manner: *Held*, that defendant not having performed his covenants, judgment should be entered for the amount stated in the bond, which was also held to be liquidated damages. *Fox vs. Snyder*, 285.

See MORTGAGE BONDS.

BANK. See NOTES AND BILLS, 1, 2. FORGED INSTRUMENTS.

BANK CHECK.

Where the payee of a check on a bank offers to take a smaller sum than the amount to the credit of the drawer, it is the duty of the bank to pay it to him, and indorse the amount paid on the check. *Bromley vs. The Bank*, 522.

BANKRUPTCY.

Effect of proceedings in bankruptcy, on proceedings *ex delicto* in State courts. *Horter vs. Harlan*, 63.

See SHERIFF. *Hopkinson vs. Leeds*, 5.

DEBTOR AND CREDITOR. *Dingee vs. Becker*, 196.

LANDLORD AND TENANT. *Longstreth vs. Pennock*, 394.

BOARD OF HEALTH. See CITY OF PHILADELPHIA. *Wistar vs. Addicks*, 145.

BOARD OF SURVEYORS.

The action of the board of surveys under the act of June 6, 1870, is subject to the right of appeal to the court, and relief in equity will not be granted. *Ferree vs. The Surveyors*, 518.

BRIDGE. See NAVIGABLE WATERS.

BROKER.

1. A broker having brought the parties together, and a contract having been made enforceable in a court of equity, is entitled to his commission. *Haines vs. Bequer*, 51.

2. The proceeds of the sale of a seat in the board of brokers of a member who failed to settle with his creditors, when sold under the articles of association of the board, are first applied to his creditors in the board. *Leech vs. Leech, Deft., and Garnishees*, 211.

3. A real estate broker who has not taken out a license as required by the act of April 10, 1849, cannot recover commission. *Costello vs. Goldbeck*, 158.

BUILDING ASSOCIATION.

Where the return of loans made by mutual saving fund, loan, or building associations, regulated by the act of April 12, 1859 (P. L. 544), is anticipated by borrowers, they are only entitled to a return of one-eighth of the premium for every whole year anticipated. They are not entitled to a proportionate return for a fraction of a year. *Building Association vs. Rock*, 75.

BURIAL LOT.

An executor required to improve a burial lot selected by decedent in his lifetime. *Bewison's Estate*, 355.

CAVEAT.

The meaning of the word "CAVEAT" in the act of April 22, 1856, defined. *Stewart vs. Austin*, 141.

CITY OF PHILADELPHIA, construction of laws and ordinances of.

1. In an action upon a municipal claim for repaving footway, defendant can only deny that the work was done, or the materials furnished, or that the price charged is greater than its value, or that it has been repaid or leased. *City vs. Lea*, 106.

CITY OF PHILADELPHIA—(Continued.)

The ordinance of June 8, 1870, that "it shall be unlawful for the department of highways to enter into contracts for repaving streets," applies only to that part of the street between the curbs. *Id.*

The pavements upon three sides of one lot cannot be considered all one pavement. *Id.*

2. The contractor for paving a street must comply with the terms of his contract, and cannot recover, when the work was done at an improper season, and proved defective in consequence. *The City vs. Brooke*, 168.

3. The power of commissioner of highways to make a contract with pavers considered. *Granite Co. vs. Dickinson*, 144.

4. A city ordinance authorized the paving of Beckett street from Woodland street to Forty-third street, and the city made a contract with the plaintiffs, for paving the street between those two points. The plaintiffs were prevented from paving the whole distance by an act of assembly, which prohibited the opening of streets through Hamilton park. The work was done by the plaintiffs under the supervision of the commissioner of highways, and was approved by him: *Held*, that the plaintiffs having paved the street as far as they were permitted by law to pave were entitled to recover from the property-owner, for the portion of the work with which he was chargeable. *City vs. Fell*, 180.

A selection of the paver made by the property-owners is not vitiated by the fact that it was made before the passage of the ordinance authorizing the paving if it was allowed to remain in full force, unrevoked and unobjected to, and the work was allowed to proceed without objection. *Id.*

Other points relative to contracts for paving public streets. *Id.*

5. The owner of a square of ground is entitled to an allowance of but fifty feet on a claim for constructing a sewer on the shorter front of said lot. *City vs. The Cottage Co.*, 84.

The claim may be filed against the whole depth of the lot when it is unimproved. *Id.*

6. Where the ashlar or true line of building conforms strictly to the line of the street, but the ornamental parts encroach on it, an injunction will not be granted to restrain such buildings, especially as this has been the custom for years, and councils have not legislated on the subject. *City vs. Board of Publication*, 499.

The city solicitor is an independent officer, and may act of his own motion. *Id.*

7. Proceedings to widen a street will be set aside where the petition does not show the grounds of action by the board of survey. *In re Merchant Street*, 590.

8. The Philadelphia, Baltimore and Wilmington Railroad Company have no right to prevent the opening of Fifteenth street, through their property at Broad street and Washington avenue. Although it will be a great inconvenience, it will not destroy any franchise of the company. *Railroad Co. vs. The City*, 563.

9. The act of May 6, 1872, authorizing the opening of Fifteenth, Sixteenth and Norris streets, declared unconstitutional on the ground that it contravenes the constitutional provision of 1864, prohibiting any bill containing more than one subject. *Comm. vs. Dickinson*, 561.

10. By the act of May 20, 1864, a vacancy in councils may be filled by election, although occurring within twenty days of the election. *Comm. ex rel. vs. Henszey*, 490.

11. That the number of members of common council of the city of Philadelphia, to which each ward is entitled, shall be determined by the number of taxable inhabitants of the ward, according to the list of taxables for the year preceding the organization. *Comm. ex rel. vs. Omensetter*, 489.

That since the registry act of 1869, and its supplements, no list of "taxable inhabitants" having been made for the year 1871, the number of members of common council, that each ward was entitled to elect in October, 1871, is to be determined by the State census of 1870; that being the latest list of taxable inhabitants made preceding the organization in 1872. *Id.*

12. The public building commission under act of August 5, 1870, enjoined from entering into a contract, differing in terms from the advertisement inviting proposals. *McIntyre vs. Perkins*, 484.

Tax-payers have a standing in court, in all cases in which public servants are expending moneys or imposing liabilities upon them. *Id.*

13. A private citizen asking for a mandamus against councils, must show a right independent of that which he holds in common with the public at large. *Comm. ex rel. vs. Park*, 481.

14. The act of June 2, 1871, takes from the Supreme Court the power of appointing guardians of the poor from and including the year 1871. *Comm. vs. Armstrong*, 479.

CITY OF PHILADELPHIA—(Continued.)

15. The city of Philadelphia can only make a valid contract in accordance with the act of April 21, 1858, section 5. *Windrim vs. City*, 550.

When plans are furnished by an architect and he receives the premium offered for the accepted plan by the city or its officers, the plan, and not the idea, becomes the property of the city. A custom among architects to retain such plans binds no one else. *Id.*

16. The controller can, under certain circumstances, refuse to countersign a bill or warrant, but this is not an absolute and unqualified power. *Comm. ex rel. Sewage Co. vs. Hancock*, 535.

17. The board of health have power to fence a lot, to remove the cause of a nuisance. *Wistar vs. Addicks*, 145.

An injunction will not be granted to restrain the action of the board, the owner having an adequate remedy at law. *Id.*

18. Before private property can be taken or charged, even under the police power of the State, there must be an *adjudication* by some tribunal authorized by law, upon the facts which render the taking proper. *City vs. Scott*, 171.

The act of March 25, 1848, "to provide for the repairs of the meadow banks upon the Delaware front in the county of Philadelphia," is unconstitutional. *Id.*

19. It is not negligence in the city that there is no fence or guard to the park highway along the Schuylkill near the bridge of the connecting railway. *Hey vs. The City*, 166.

20. By the ordinance of May 25, 1860, a bidder is required to give security upon each bid. Allison, P. J., and Finletter, J., dissent. *Dutton vs. The City*, 597.

It is not a misdemeanor in office for an officer to receive a compensation for services which are not his official duty to perform. Finletter, J., dissents. *Id.*

CITY SOLICITOR. See CITY OF PHILADELPHIA, 6, 20.

COMMISSIONER OF HIGHWAYS. See CITY OF PHILADELPHIA, 1, 2, 3, 4.

COMMON CARRIER.

1. Where a common carrier applies to a judge of the Court of Common Pleas for an order of sale of goods in his possession to satisfy his lien, upon the ground that the places of residence of the owner and consignee are unknown (in pursuance of the act of December 14, 1863, P. L. 1864, Appendix, p. 1127), and such order is granted, it is his duty to expose the goods for public sale at auction. If he sells trunks or boxes, filled with valuable goods, as trunks or boxes the contents of which are unknown, without exhibiting the goods or stating what is in the trunks or boxes, so that the buyers cannot know what they are bidding for or buying, such a sale is contrary to the act of assembly and the order made under it, and is unlawful, and the carrier will be responsible to the owner for the value of the goods. *Schlessinger vs. The Adams Express Co.*, 70.

2. The plaintiff packed her trunks in New York in February, locked them and then came to Philadelphia to reside, leaving the trunks in the custody of a friend, but keeping the keys herself. In April, she employed the defendants to bring the trunks from New York, which they accordingly did. There being evidence to show that when they arrived in Philadelphia, they were locked and to all appearances in the same condition as when she left New York: *Held*, that it was properly left to the jury to say whether the things which were in them when she left New York were in them when they came into the possession of the defendants. *Id.*

3. Representations and declarations made by the agent of a corporation in the course of the business intrusted to his particular care are binding upon the corporation, notwithstanding they produce evidence to show that he had no authority to make those declarations or representations. Persons dealing with the corporation by such an agent have a right to suppose that he has authority to speak for them relative to the business intrusted to his special care. *Id.*

4. A railroad company having receipted for merchandise, "to forward . . . to T. Mullarkey, Tuscaloosa, Ala." (a point beyond its line), proved the delivery of the merchandise, in good order, to the next carrier in the regular course of transportation to Tuscaloosa: *Held*, that the company had fully performed its duty, and was not liable for damage occurring after such delivery. *Mullarkey vs. The Railroad Co.*, 114.

5. Where several barrels of a cargo were delivered empty, and the bill of lading provided that freight should be "payable on each and every barrel delivered full, not full or empty," the burden of proof is upon the party seeking to charge the

COMMON CARRIER—(Continued.)

carrier to show that the leakage was the result of negligence. *Forbes vs. Dallett*, 515.

See EQUITY. *Cambloss vs. Railroad Co.*, 411.

CONSTITUTIONAL LAW.

An adjournment of the House, for more than three days, without the concurrence of the Senate, does not *ipso facto* work a dissolution of the General Assembly. *West Philadelphia Railroad vs. Union Railroad*, 495.

The act of assembly of March 13, 1872, held not to give defendants the right to run their track along Front street, or to make the intended connection at that point. Allison, P. J., Ludlow and Finletter, J. J. *Id.*

This act of assembly sins against the constitutional requirement that no act shall contain more than one subject, and that its title does not clearly express the subject contained in the act. Allison, P. J., and Finletter, J. *Id.*

See CITY OF PHILADELPHIA, 9, 18. CORPORATION, 6, 7.

CONTINUANCE.

The duties of parties in regard to service of subpoenas and taking depositions, and the cases in which continuance will be granted, considered. *Smith vs. Cunningham*, 96.

CONTRACT.

1. Though words implying in a popular sense a bargain and sale are to be restricted, in their signification, to carry out the intention of the parties, such intention must be manifest, or full effect should be given to their popular meaning. An executory contract may afterwards be converted into a complete bargain and sale by the appropriation of specific goods to the contract. *Records vs. The Railroad Co.*, 55.

2. A contract whereby R. sold M. 100,000 feet of lumber, fixed the price per inspection, and appointed B. to inspect it: *Held*, that certain lumber—that in suit—part of the 100,000 feet mentioned in the contract, upon inspection became appropriated to the contract, and the title thereto vested in M. *Id.*

3. Inspection of a part only of the 100,000 feet will not affect the purchaser's right to so much, or prevent title thereto vesting *eo instanti* with inspection, if they assent to receive it. *Id.*

4. If an owner interferes with a contractor, and subjects him to his command, the contractor is not liable for injuries to his work occasioned thereby. *Rohrman vs. Seese*, 185.

5. A contract prohibited by law will not be enforced in a court of equity. *Windrim vs. City*, 550.

See ACTION. SHIPPING, 8, 9, 10. TELEGRAPH CO., 4. DECEDENT, 3. COVENANT. VENDOR AND VENDEE.

CONTRACTORS, CITY. See CITY OF PHILADELPHIA, 1, 2, 3, 4, 5, 20.

CONTROLLER, CITY. See CITY OF PHILADELPHIA, 16.

CORPORATION.

1. The title of a statute may under some circumstances be decisive of its intent and construction. *Insurance Co. vs. Stokes*, 80.

2. To give force and effect to an act of incorporation it must be accepted by the company incorporated. But it is not necessary to show a written instrument, or even a vote of acceptance. It may be inferred from the acts of the company, as from the election of officers, the holding of meetings, the adoption of by-laws, or the actual use of the powers or privileges granted. An acceptance by the directors, acquiesced in by the company, is sufficient. *Id.*

3. An injunction will not be continued against a corporation merely because a dispute has arisen as to the election of directors who have not yet even taken their seat. *Paynter vs. Clegg*, 480.

4. An attachment was issued against a corporation, and a judgment obtained on it; but prior to the judgment the corporation was dissolved and a receiver appointed: *Held*, that the attachment should be set aside, and the property handed over to the receiver. *Frailey vs. Fire Insurance Co.*, 219.

5. A corporation will not be enjoined from issuing bonds or selling personal property on complaint of a creditor, not holding a lien, or other legal claim against the property; much less upon a claim for unliquidated damages on a guarantee. *Railway Co. vs. The Coal & Iron Co.*, 262.

CORPORATION—(Continued.)

6. The Legislature cannot repeal a charter granted prior to the constitutional amendment of 1857. *The Tara Benevolent Society*, 287.

7. A committee of the Legislature has not the judicial power to investigate and declare that a corporation has been guilty of unlawful acts. *Allen vs. Buchanan*, 283.

8. A joint stock company was organized under the laws of a State, one of which provided that nothing contained in it should be construed to give to such company any rights and privileges as a corporation. The same laws authorized such a company to sue in the name of their president. *Cambloss vs. Railroad Co.*, 411.

9. *Quare*, whether such a company was a citizen of that State within the meaning of the 11th section of the judiciary act of September 24, 1789, defining the jurisdiction of the circuit courts. *Id.*

10. Trustees of an insurance company, one of whom was its solicitor, and the other its travelling agent, the by-laws not designating these as officers: *Held*, that thereby they did not become "officers" thereof, and within section 66 of the criminal code. *Comm. vs. Christian*, 556.

11. The Supreme Court will not approve a charter. *The Tara Benev. Soc.*, 287.

Quare, as to their authority under the new constitution. *Id.*

12. A charter of a church will not be amended so as to alter its original principles, even if asked by a majority of the congregation, where the minority object. *Charter of Hebron Church*, 609.

13. An act of an officer of a corporation, afterwards ratified by the board of directors, becomes by such ratification the authorized act of the corporation. *Rice vs. Railroad Co.*, 294.

See PATENT, 9.

COSTS.

1. Proceedings will be stayed until payment of the costs of a former action for the same cause between the same parties, although the former action was ended by a compulsory nonsuit. *Gerety vs. Railroad Co.*, 153.

2. Costs paid to sheriff by plaintiffs on staying writs of *lev. facias* cannot be recovered from the fund for distribution. *Boyd vs. Mole*, 118.

3. Of prothonotary of District Court on distribution of fund in court. *Krause vs. Stiles*, 127.

4. An attachment will not be issued against a plaintiff in equity, who has failed in his suit, for his neglect to pay the costs of the suit. *Cochran vs. Gowen*, 299.

5. The liability of the county or the prosecutor to costs in criminal cases is entirely statutory and did not exist at common law. *Comm. vs. Curren*, 623.

6. The boarding of prisoners is a public charge on the county and is not recoverable from prisoner. *Id.*

7. The liability of defendants, prosecutors and the county for costs considered. *Id.*

8. Of the discharge of prisoners under the act of June 16, 1836, section 47 and 58. *Id.*

9. The discharge of prisoners by the county commissioners—their power considered. *Id.*

See DEPOSITION. EQUITY, 13.

COURTS. See ORPHANS' COURT.

The District Court will not, under ordinary circumstances, re-hear a motion for an injunction which had been heard and refused by a co-ordinate court. *McNair vs. Cleave*, 212.

COVENANT.

An action of assumpsit against two cannot be sustained on an instrument under seal signed by one containing no agreement to bind the other. *Norris vs. Mail-land*, 7.

A covenant by one on behalf of himself and others to pay money in a matter of common interest does not purport to bind any but the covenantor. *Id.*

Prevention in many cases is equivalent to performance. *Id.*

CRIMINAL LAW.

1. The admission of visitors to a tavern on Sunday is not an infraction of the Sunday liquor law. *Comm. vs. Sheriff*, 569.

2. It is a conspiracy for two or more to act in concert to enforce the Sunday liquor law. *Comm. ex rel. Shea vs. Sheriff*, 569.

CRIMINAL LAW—(Continued.)

3. It is an indictable offence for an alderman to take other or greater fees than the fee bill allows. *Comm. vs. Hagan*, 574.
 4. A party conducting a business for joint account of himself and another, failing to account for profits, is not liable for larceny as bailee. *Comm. ex rel. Bartlett vs. Superintendent*, 581.
 5. An advertisement in a newspaper "warning the public against the negotiation of notes, etc., alleged to have been stolen," is a privileged communication, and express malice must be shown to make it a libel. *Comm. vs. Featherston*, 594.
 6. What is a false preterpoe? *Comm. vs. Fisher*, 594.
 7. It is not an assault and battery, to resist an officer making an arrest without a warrant for misdemeanor not committed in view of the officer. *Comm. vs. Bryant*, 595.
 8. An indictment setting out the authority of an officer must name the office. *Comm. vs. McMenamce*, 596.
 9. The indictment need not conform precisely to the alderman's return. *Comm. vs. Wohlgemuth*, 592.
 10. An indictment for fraudulently altering a receipt, that being no averment that it was made to the prejudice of another right, held bad on demurrer. *Comm. vs. Shisler*, 587.
 11. The omission of the words of the peace in an indictment is fatal. *Comm. vs. Mackin*, 593.
 12. The plea of *autre fois acquit*, practice in case of. *Comm. vs. Conner*, 591.
 13. A jury on a case of burglary may seal their verdict and separate. *Comm. vs. Boyle et al.*, 592.
 14. A defendant may be separately convicted of larceny, and of entering a dwelling with intent to steal. *Comm. vs. Peiffer*, 593.
 15. An entry of forfeiture of recognizance will not be made *nunc pro tunc*. *Comm. vs. Bauer*, 589.
 16. A pardon and remission of fine procured by fraud are void. *Comm. vs. Kelly*, 586.
 17. A juror is qualified to act who states he will try the case impartially upon the evidence and that alone. *Comm. vs. Morrow*, 583.
 18. Evidence will not be admitted of other transactions occurring some time before and having no connection with the issue. *Id.*
 19. The practice as to inflicting the penalty provided by the statute for the second offence discussed. *Id.*
- See COSTS. *Comm. vs. Curren*, 623.

DAMAGES.

1. A jury may award damages to a tenant for life as well as to a trustee of the fee in remainder. *Passmore vs. Railroad Co.*, 579.
 2. The tenant for life is entitled to claim damages without the intervention of the trustee of the remainder. *Id.*
- See FAIRMOUNT PARK. RAILROAD, 1.

DEBTOR AND CREDITOR.

1. Proving a debt in bankruptcy does not of itself operate as an absolute extinguishment or satisfaction of the debt. If the bankrupt's discharge is refused, the creditor who has proved his debt is remitted to his former rights and remedies. *Dingee vs. Becker*, 196.
2. But a creditor who has proved his debt is barred during the pendency of the proceedings in bankruptcy from pursuing the bankrupt in any other forum. If there is unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, the remedy of the creditor who has proved his debt is to speed the determination of the question of the bankrupt's discharge. If the bankrupt neglects to apply for his discharge, or to prosecute his application with reasonable diligence, the creditor who has proved his debt must obtain leave of the court of bankruptcy to prosecute his claim by due course of law, or move to dismiss the application for discharge. Without this he cannot proceed to collect his debt in another court until the bankrupt's discharge is refused. *Id.*
3. A creditor who has not proved his debt nor made himself a party to the proceedings in bankruptcy is not precluded from proceeding to collect his claim by an action at law, if the bankrupt has been guilty of unreasonable delay in endeavoring to obtain his discharge. Such a creditor is not to be sent to the bankruptcy court for relief, but the question of unreasonable delay is to be determined by the court in which the action is pending. *Id.*

See ACTION, 3. MARRIED WOMAN, 2, 3. SHERIFF 2.

DECEDENT. See EXECUTORS AND ADMINISTRATORS.

1. A sister-in-law may recover for services as house-keeper. *McCarty's Estate*, 318.
2. Where a man in his last illness and about to make his will, signed a promissory note payable to a third person, and left it in the hands of his executor, under circumstances which gave rise to a strong presumption that he intended it as a gift: *Held*, that an action could not be maintained upon it without proof of a valuable consideration. *Walsh vs. Kenedy*, 178.
- Quære*, whether, with proof of a valuable consideration, an action could be maintained upon it, it never having been delivered to the payee, either by the decedent or his executor. *Id.*
3. An executor bought materials to enable him to complete unfinished contracts of his testator, used the materials for that purpose, received the money therefor, and put it into his own private business: *Held*, that the estate was not liable to pay the party who furnished the materials. *Oram's Estate*, 358.
4. A sum of money received by a distributee, held to be on account of his share of decedent's estate. *Pilling's Estate*, 353.
5. A party to a claim on decedent's estate, incompetent as a witness. *Scheets vs. Hanbest*, 188. *Young's Estate*, 348.
6. In the absence of personal estate, real estate is the only resource of creditors of a decedent. *Cunningham's Estate*, 308.
- In all cases an account should be filed by the administrator. *Id.*
7. Real estate of a decedent is a fund for the payment of legacies. *Monro's Estate*, 309.

DEPOSITION.

The court, on application of plaintiff, may order defendant to file the depositions taken on his behalf, on payment by plaintiff of the cost for taking the depositions. *Martin vs. Dearie*, 186.

DIVORCE.

1. Where proceedings in divorce have been carried on regularly, the respondent appearing and taking part therein; until the entry of the rule for divorce; leave to file an answer NUNC PRO TUNC will not be granted. *Shay vs. Shay*, 521.
2. A case will not be referred to an examiner on the respondent's application where she has had full and ample opportunity to testify. *Candy vs. Candy*, 516.
3. The causes of divorce must be "particularly and specially" set forth in the libel—the averments of desertion and cruelty should be in the words of the act of assembly. *Edwards vs. Edwards*, 617.

EJECTMENT.

1. Where defendant is the tenant of plaintiff, title need not be shown out of the Commonwealth. *Thompson vs. Graham*, 53.
2. An expression of intention, by one in possession of real estate, "to claim the property, as he did not believe the plaintiff had any title," is a sufficient commencement of adverse possession; and the time of this expression is a question for the jury: "Whether a plaintiff had made a re-entry for condition broken, in accordance with the stipulations of the deed, is a question for the jury." *Cadwalader vs. App*, 175.
3. Where defendants had come into possession of real estate as tenants of plaintiff, it is not necessary that title should be shown out of the Commonwealth. A tenant cannot set up an adverse title against the lessor. *Thompson et al. vs. Graham et al.*, 53.
4. A purchaser at an Orphans' Court sale in partition, paid, by leave of the court, only so much of the purchase-money as was not distributable to himself and three others, whom he represented: *Held*, if there were a resulting trust in favor of the persons so represented, it should be asserted by them in the appropriate mode, and within the time limited by the act of April 22, 1856. *Townsend vs. Roy*, 120.
5. A defendant in ejectment may set up an outstanding title in a third person, but it must be an outstanding legal title. That the plaintiff holds the legal title in trust for a third person cannot avail the defendant. *Id.*
6. One who recovers in ejectment claiming the whole estate, cannot set up the record as evidence, that he is in possession as *cestui que trust* for an undivided portion and thereby escape the operation of the act of 1856. *Id.*

ELECTIONS.

Persons under treatment at a hospital are not entitled to vote as residents. *Election Law*, 497.

ELECTIONS—(Continued.)

Soldiers of the United States must prove residence when required by the canvassers. *Id.*

The names of soldiers temporarily located in an election division need not be registered therein. *Id.*

Residence is accurately defined in the Constitution. *Id.*

A hotel-keeper residing in another place should be registered at his private residence. *Id.*

EQUITY. See MORTGAGE BOND. CORPORATION, 3, 5. CONTRACT, 5. COURTS. MARRIED WOMAN, 2, 3. EVIDENCE, 2.

1. A person may proceed in equity for compensation for services, under a contract with an association, although he was one of its members and one of the signers of the contract. *Price vs. Spencer*, 281.

2. Where there is an adequate remedy at law, there is no jurisdiction in equity. *Long vs. Cochran*, 267.

3. Courts will not relieve a party from contract or agreement entered into by mistake, where the mistake is one purely of law. *In re Dunham*, 471.

4. Where there is no irreparable injury alleged beyond a general averment of a breach of contract, a court of equity will not interfere. *Telegraph Co. vs. Reading Railroad*, 494.

5. Where plaintiff's equity is in doubt, injunction will be dissolved. *Bedford vs. Potter*, 560.

6. A preliminary injunction is never granted to enforce a mere right, but only to prevent irreparable mischief. *Coal Co. vs. Railway Co.*, 250.

7. And it will not be granted when it will subject a defendant to loss without being of benefit to the plaintiff. *Id.*

8. A mandatory injunction, as a general rule, can only be properly granted on final hearing, as its effect before that time is like awarding an execution before trial and judgment. *Id.*

9. A motion for an injunction refused by a co-ordinate court will not be heard. *McNair vs. Cleave*, 212.

10. To sustain an application for a special injunction the right of the complainant to the equitable relief prayed for must be unquestionably established. *Pfund vs. Berlinger*, 549.

11. A surety filed a bill in equity asking to restrain certain proceedings against him at law; the bill was ordered to be retained until verdict in the common law cases, and then, if necessary, plaintiff might come in. *Ashton vs. Bayard et al.*, 527.

12. Defendant may be allowed to amend his answer by a formal denial of the averments in plaintiff's bill. *McBride vs. Patton*, 271.

13. The costs allowed in equity proceedings are subject to the discretion of the court. *Spering vs. Smith*, 277.

14. The 4th and 8th equity rule as to exceptions to a bill for surplusage and impertinence are to be construed together. *Insurance Co. vs. Bauer*, 147.

15. Two bills for injunction were brought against a railroad company—one of them by an express carrier, the other by a stockholder in the railroad company, in his interest. On these bills preliminary injunction was refused. *Cambloss vs. Railroad Co.*, 411.

16. The proper junction of a mandatory order and a preliminary injunction considered. *Id.*

17. The right of a stockholder of a corporation to the remedy by injunction against the corporation discussed. *Id.*

18. An express carrier injured in his business as a freighter, by the action of a railroad company, is not entitled to relief by preliminary injunction. *Id.*

19. A court of law, and not a court of equity, has primary cognizance of the question of the right of the railroad company carrying packed parcels for a middleman, who does not own them, to charge him with any addition, however small, to what would otherwise be the regular charge for carrying the package in mass. *Id.*

20. The legal right of the railroad company under the last head is not so clearly deniable as to warrant the summary decision of it against them by a court of equity. *Id.*

21. *Quare*, whether an express carrier who does not himself encroach on rights of the public, and who submits to all necessary and proper regulations of the railroad company, cannot, without obtaining a judgment at law, have relief in equity against such an overcharge. *Id.*

EQUITY—(Continued.)

22. An express carrier who does not submit or offer to submit, to such regulations, but insists on having preferential accommodations or facilities which could not be allowed without encroachment on rights of the railroad company, and of the public, cannot be relieved before the final hearing. *Id.*

23. *Quare*, whether he can have relief at the final hearing. It seems that he may, in cases in which part of the decree relieving him may be an adjudication against his pretensions, which are unfounded. *Id.*

ESTRAYS.

The city has the right by ordinance to direct the seizing and sale of stray horses. A sale on the day of its advertisement is not sufficient notice to the owner. *Conier vs. Whitney et al.*, 184.

EVIDENCE.

1. In an action on the case for the wrongful cancelling of a certificate of loan, and the transfer of the loan to another party without authority, the defendant may be compelled under the act of 1798, to produce at the trial the books and papers relating to the transaction. *Moelling vs. The Coal and Nav. Co.*, 223.

2. The act of 1798 was intended to accomplish the same purpose in a court of law as a bill of discovery in equity, and should be construed upon the same principles. *Id.*

3. The language of *Morgan vs. Watson*, 2 Whart. 10, must be considered as applied only to a case of such tort as involves penalty or forfeiture. *Id.*

4. The act of 1869 disqualifies a party as a witness when the other party is dead, although he would not have been disqualified prior to that act. *Sheetz et al. vs. Hanbest*, 188.

5. In an action for damages for wrongful dismissal of a plaintiff who is called as a witness, the defendants may cross-examine him as to whether he faithfully performed his duties. *Henderson vs. The Hydraulic Works*, 100.

6. Facts brought out in cross-examination, and not explained, entitle the plaintiff in this case to have the nonsuit taken off. *Id.*

7. It seems that the right of cross-examination is so-extensive with the testimony in chief as a whole. *Id.*

8. Claimants are not competent though not objected to, as witnesses before auditors in distribution of intestate's estate. *Young's Estate*, 348.

9. The record of the discharge of an insolvent is not conclusive evidence that notice was given of the hearing of creditors. *Berens vs. Rasch*, 45.

10. A party who appears by other testimony to be adverse, is not competent where the other party is dead. *Leech vs. Bonsall*, 204.

11. The record of a suit in the District Court showing the amount in the hands of the garnishee will be received in evidence in the Court of Common Pleas in another attachment against the same garnishee. *Hanlon vs. Bibbey*, 517.

12. A defendant in a foreign attachment may testify to the value of the goods in the hands of the garnishee. *Moore vs. Thompson*, 164.

See PARTNERSHIP, 11, 12. LIFE INSURANCE, 5. ATTORNEY, 6.

INSOLVENT. LETTERS ROGATORY. DEPOSITION. MORTGAGE, 6.

WARRANT OF ARREST. 4. NEW TRIAL, 3, 4, 5.

EXECUTION.

1. Where a levy has been made under a *f. fa.*, and the goods are claimed by a third person, and an issue is pending under the sheriff's interpleader act, an *alias f. fa.* is erroneous, and will be set aside. *Burns vs. Toner*, 57.

2. A defendant, whose lands have been extended and delivered to plaintiff, may, on filing an affidavit of facts showing a prima facie satisfaction of the debt, have a *scire facias ad computandum et rehabendum terram*. *Scofield vs. Harbeson*, 38.

See SHERIFF, 1, 2, 4, 5.

EXECUTORS AND ADMINISTRATORS.

1. One co-executor cannot release a debtor, for a deposit made in the names of both executors. *Executors of Williams vs. De Haven*, 173.

2. After twenty years it is the presumption that an administrator's account is duly settled, and the burden of proof is on the complainant to overthrow this presumption. *Bentley's Estate*, 344.

3. Where an administrator had embezzled personal assets, and real estate was sold to pay debts, sureties on administration bond are liable to the heirs in an action on the bond. *Comm. vs. Keil*, 140.

4. The Orphans' Court cannot, upon petition of the administrator *d. b. n.*, grant a citation upon the removed administrator to *forthwith* hand over all properties of the estate. *Bradley's Estate*, 327.

EXECUTORS AND ADMINISTRATORS—(Continued.)

- It may compel him to file an account. *Id.*
5. Since the act of April 8, 1871, a foreign executor can transfer stock, and the company is not obliged to see that the will gives the executor the power to assign or dispose of the stocks; it is to be presumed that it does. *Williams vs. Railroad Co.*, 298.
6. An executor having a naked authority to sell real estate is not chargeable with a failure to collect rents. This is not part of his duty. *Myers' Estate*, 310.
7. The law defines clearly the instances in which an administrator can make application for sale of real estate. *Brennflock's Estate*, 324.
8. In all cases administrators should file an account. *Cunningham's Estate*, 308.

EXEMPTION.

1. Defendant is entitled to claim exemption under an attachment execution. *Ashton vs. Glass*, 510.
2. A widow electing to take her \$300 exemption out of real estate should proceed according to the act of November 27, 1865.

EXPRESS COMPANY. See EQUITY, 15 to 23. COMMON CARRIER, 2, 3.

FAIRMOUNT PARK.

- A jury in assessing damages for taking land for Fairmount Park, may consider the advantages accruing to the owner from the portion of his land not taken. *In re Damages Fairmount Park*, 553.
- The act of June 15, 1871, does not affect this question. *Id.*
- A partition by amicable action or conveyance after the taking by the park, does not alter the status of the party claimant. *Id.*

FORGED INSTRUMENTS.

1. The act of April 5, 1849, relative to the recovery of money paid on a forged instrument, was not intended to relieve a bank from the consequences of negligence in paying a forged check of a depositor, where the party receiving the money has, before notice of the forgery, innocently changed his condition on the faith of the bank's action. *Corn Ex. Nat. Bank vs. Nat. Bank of the Repub.*, 133.
2. In an action to recover back money paid on a forged bill or forged indorsement, it is in general no defence that the person paying was negligent in not detecting the forgery. What the relative rights of the parties would have been, if the person receiving the money had been a mere agent for collection, and had paid it over to his principal before notice, not decided in this case. *The Bank vs. Chambers*, 129.
3. The act of 5th April, 1849, Purdon, 159, commented on. *Id.*

FRAUD.

1. A decree of the United States Circuit Court, restraining a party from proceeding in the State court, to collect a judgment against the bankrupt's estate, the judgment having been obtained upon a note drawn by the plaintiffs, on which said bankrupt was the last indorser, cannot prevent the plaintiff from proceeding against the defendant *ex delicto* in the district court, on account of his fraudulent appropriation and embezzlement of the proceeds of said note. *Horter vs. Harlan*, 63.
2. The pendency of proceedings in bankruptcy, against the defendant, does not suspend proceedings against him in this court for fraud or embezzlement, such debts being expressly excepted from the operation of the act of Congress. *Id.*
- See WARRANT OF ARREST.

GARNISHEE.

1. The plaintiff having a judgment against Richard Johnson issued an attachment execution, which was served upon the garnishees. The garnishees were indebted to the defendant, whose real name, however, was Richard H. Johnsen. After service of the attachment the garnishees paid the money to the defendant. *Held*, that they were not relieved from responsibility to the plaintiff by reason of the alleged misnomer of the garnishee in the writ. *Paul vs. Johnson*, 32.
2. A general judgment against a garnishee for want of an appearance stricken off as informal. *Mawson vs. Goldstone*, 30.
3. Where there has been a judgment for defendant in an attachment execution, it necessarily discharges the garnishee. *Commercial Co. vs. Conrad*, 24.

GROUND-RENT. See MONEY.

Presumption of apportionment of a ground-rent does not arise because a part owner pays the whole, the ground-rent landlord has a right to consider the party paying as agent for parties concerned. *Brown's Petition*, 548.

GUARDIAN.

A guardian, as long as he remains the rightful bailiff of the property, is entitled to reasonable allowances as a trustee. *McNickle vs. Henry*, 243.

A trustee should keep up insurances which were on the property when it came into his hands. *Id.*

GUARDIANS OF THE POOR. See CITY OF PHILADELPHIA, 14.**HUSBAND AND WIFE. See DIVORCE. MARRIED WOMAN.****INSURANCE, FIRE.**

1. Plaintiffs paid defendant as agent of an insurance company a premium of \$99, which was not paid over to the company, and a fire occurring, the plaintiffs compromised, taking \$274.12 less than the adjusted loss: *Held*, that the difference could not be recovered from the agent, but that the \$99 was evidently not embraced in the settlement. *Haight et al. vs. Kremer*, 50.

2. A contract of reinsurance is a contract of indemnity, and the reinsured may go into equity as soon as the claim arises upon him, without waiting to pay the original insured. *Safe Deposit Co. vs. Insurance Co.*, 292.

INSURANCE, LIFE. See PLEDGING. Scott vs. Insurance Co., 206.

1. The relation of FATHER and SON is sufficient to establish an insurable interest in the life of the father. *Kane vs. Life Ins. Co.*, 234.

2. A insured the life of her husband and subsequently joined him in executing an assignment to B in trust for her husband's children; after his death, A challenged the right of the trustee to the fund: *Held*, that the trustee was entitled to it. *Bond vs. The Insurance Co.*, 149.

3. A voluntary assignment which does not pass the legal title held in this case sufficient as an equitable transfer. *Id.*

4. In a case where the answers to the interrogatories accompanying an application for a life insurance were representations and not warranties, and in which the question was, whether the answers were made in good faith, or falsely and fraudulently, the jury having found a verdict for the plaintiff upon competent and satisfactory evidence, the court refused a new trial, although it appeared by a *post mortem* examination that the answers were erroneous in point of fact. *Schaible vs. Life Ins. Co.*, 136.

5. A photograph, recognized and proved by witnesses to be a correct and truthful representation of the deceased, at or about the time of the insurance, permitted to go to the jury as evidence of the physical appearance and condition of the assured at that time. *Id.*

INSOLVENT.

In an action on an insolvent's bond, the breach assigned being that the insolvent did not give the notice of hearing to his creditors required by law, the record of the insolvent's discharge is not conclusive evidence against the plaintiff that the insolvent did give such notice. *Berens vs. Rasch*, 45.

INTEREST.

When income or interest is bequeathed it begins to run from the death of the testator, if the fund is productive and the estate free of debt. *Sergeant's Estate*, 346.

ISSUE. See ORPHANS' COURT, 1.

1. The Orphans' Court may, if they see fit, disregard the verdict of a jury upon an issue passed and awarded upon exceptions to an auditor's report. *Shoomaker's Estate*, 306.

2. The court of the county in which a transcript of the record of a judgment from another county was entered cannot frame an issue to test the validity of the judgment. The court of the county in which it was originally entered has this power. *Gordon's Estate*, 350.

3. If the affidavit is sufficient the requirement for an issue becomes a matter of right. *Id.*

4. A demand for an issue before a jury need not be allowed by an auditor unless there are sufficient averments to establish the fact. *Hill's Estate*, 355.

JUDGMENT. MORTGAGE BONDS, 8. GARNISHEE, 2, 3. ORPHANS' COURT, 1. GARNISHEE, 2, 3. FRAUD, 1.

JURY.

1. A juror is qualified, who states that he will try the case impartially upon the evidence, and that alone. *Comm. vs. Morrow*, 583.
2. A challenge to the favor allowed in a civil suit. *Boileau vs. Life Ins. Co.*, 218. See NEW TRIAL, 5. CRIMINAL LAW, 13.

LANDLORD AND TENANT.

1. It was stipulated that a surety for payment of rent should have notice of tenant's default: *Held*, that without such notice, suit could not be maintained against the surety. *Hillary vs. Rose*, 139.
2. A parol lease of her property for a year by a married woman is binding upon her, where she has received a valuable consideration for it in advance and accepted the rent as it fell due. *Welsh vs. Oates*, 154.
3. Where a lease provided that the tenants, the city, should pay all taxes, and afterwards the Legislature exempted the property from taxation, as long as used for charitable purposes: *Held*, that the city was still liable to pay the amount of the taxes to the landlord; the act being passed for the benefit of the charitable society and not for the city. *German Soc. vs. The City*, 245.
4. Rent for store occupied by bankrupt, and subsequently by his assignee, and where there were sufficient goods to satisfy rent on distress, should be paid in full by assignee up to the time of the surrender of the property. *Longstreth vs. Pennoek*, 394.
5. A surety upon an ordinary lease continuing from year to year, gave three months' notice in writing to the landlord, that at the expiration of the then current year he would no longer be responsible for the rent: *Held*, that at the expiration of that year he was discharged from any further liability. *H. Desilver's Estate*, 302.

LEGACY. See INTEREST. DECEDENT, 7.

When a specific legacy is to be treated as a general legacy. *Schott vs. Schott's Executors*, 255.

Where under a particular clause a legacy is given contingent upon an event happening either before or at the period fixed for the distribution of the general assets, the general intent that the distribution of the estate shall not be made until an ascertained time, will override the particular clause so as to defer the payment, and perhaps the vesting of the legacy, until the distribution of the estate, and this principle applies to a specific as well as to a general legacy. *Id.*

LEGISLATURE. See CONSTITUTIONAL LAW. CORPORATION, 6, 7.

LETTERS ROGATORY.

Depositions taken by a foreign tribunal under letters rogatory issued by th court will not be rejected because it appears that the plaintiff's attorney attended at the taking of the depositions, it appearing that such attendance was in conformity to the usual course of procedure of the foreign tribunal in such cases. *Keuhling vs. Leberman*, 160.

LIMITATION OF ACTION.

1. Where an officer of the United States paid a draft upon a forged signature, and more than six years afterwards suit was brought to recover the same from the banker who had innocently collected the same: *Held*, the action not to be sustained. *United States vs. Cooke & Co.*, 468.
2. The statute of limitations is a good plea in bar of an action upon stock which has been forfeited over six years for non-payment of assessment. *Whetnam vs. Canal and Railroad Co.*, 284.

LUNATIC. See PARTNERSHIP, 4.

MALICIOUS PROSECUTION.

An action for a malicious prosecution will lie against a corporation aggregate. *Fenton vs. The Sewing Machine Co.*, 189.

To maintain such an action it is not necessary to show an express authority from the corporation to its agents to institute the prosecution and carry it on. It is sufficient if the evidence shows that the prosecution was commenced and carried on by agents of the corporation, in its interest and for its benefit, and that they acted within the scope of the authority conferred upon them by the corporation. *Id.*

MANDAMUS.

The return to a mandamus must be "certain to a certain intent in general."
Comm vs. Hancock, 535.

MINE.

The owner of an upper mine must use reasonable diligence to prevent the flow of water from his mine into a lower mine. The maxim *SIC UTERE TUO UT ALIENUM NON LÆDAS*, applies to such a case. *The Coal and Iron Co. vs. Gorrell*, 247.

MINOR.

The court will not order the sale of real estate of a minor where there is a doubt as to his title, as it might detract bidders and sacrifice the property. *Moore's Estate*, 326.

MISNOMER. See **GARNISHEE**, 1.

MARRIED WOMAN.

1. A married woman cannot carry on an action in her husband's name and her own for a tort to herself without his consent and against his wishes. *Clark and Wife vs. Koch*, 109.

2. Where a creditor under a judgment against his debtor has levied upon real estate which is claimed by his wife, or by one who was his wife at the time the property was acquired, and where the creditor in his answer denies the title set up by the wife, he will not be enjoined from proceeding with his execution and selling the property as the husband's property. *Shuster vs. Bennett*, 208.

3. A creditor who denies in his answer a married woman's title to real estate, and alleges that the property belongs to her husband, will not be enjoined from levying on it and selling it as the husband's property. Under such circumstances a court of equity will not investigate the title, but leave the parties to contest it at law. *Dyer vs. The Bank*, 159.

4. A parol lease for a year is binding upon a married woman, where she received a valuable consideration for it in advance, and the rent as it fell due. *Welsh vs. Oates*, 154.

5. A married woman cannot be legally clothed with the title to land, when she has the control of no means and no credit which are exclusive of her husband's rights. *Marburger vs. Spohn*, 612.

See **TRUST AND TRUSTEE**, 2, 6.

MECHANICS' LIEN.

1. After a *sci. fa.* has been issued on a mechanics' lien, defendant cannot enter security in the usual form under the act of 1868, and ask the court to quash the writ. *Hood vs. The Building Association*, 105.

2. The court will not approve of the security, unless the issuing of the *sci. fa.* is recited in the bond, and it contains a warrant of attorney for entering judgment for the amount that shall be found due with interest and costs. *Id.*

3. Plaintiffs upon staying their writs of *lev. fa.* paid sheriff his costs: *Held*, that they could not recover this from the fund for distribution. *Boyd vs. Mole*, 118.

4. Materials furnished upon the credit of the buildings must not exceed more than could reasonably be used in their construction. *Id.*

5. Houses put up in blocks of two each, there should be a lien filed against each block. *Id.*

6. An assignment for the benefit of creditors does not prevent the filing of a mechanics' lien for alterations under the act of 1868. *Crumpp vs. Gill and Wife*, 117.

7. The assignee is not a "purchaser" within the meaning of the act. *Id.*

8. A recovery cannot be had upon a note given for the balance of plaintiff's claim which plaintiff had just released in a deed of composition with other creditors. *Callahan vs. Ackley*, 99.

9. A release of lien under seal, executed on a promise to pay the money, is void for failure of consideration, upon proof of the facts before the auditor. *Benson vs. Mole*, 66.

10. One apportioned mechanics' claim can be filed against two blocks of houses fronting on different streets, where the rear ends extend to and are bounded by a three feet wide alley common to both. *Allen vs. Fitzpatrick*, 142.

11. A lease provided that the lessee should repair the premises at his own expense, and make alterations to fit it for a HOTEL: *Held*, that this was a sufficient WRITTEN CONSENT under the act of August 1, 1868, to authorize filing of lien for work done for lessee. *Amos vs. Clare*, 55.

MECHANICS' LIEN—(Continued.)

12. A patentee having contracted to put up a patent elevator in a hotel, employed plaintiffs to do the work and furnish the materials. The elevator was found unsuitable and was not finished: *Held*, that plaintiffs had no lien on the building, but must look to the patentee who employed them. *Kilton vs. Crump*, 41.

13. Those who furnish work for a building, whether with or without material, must inquire whether they are engaged by the general contractor for erection, or by one who has specially contracted with the owner to furnish the kind of work called for. If by the latter, they can have no recourse to the building, except that which a claim filed in his name and right may give them. *Id.*

14. An agreement among lien creditors in regard to purchase of defendant's property at sheriff's sale, does not discharge defendant's liability to the creditors. *Allen vs. Rafsnnyder*, 199.

MONEY.

A ground-rent reserved in "lawful silver money of the United States, each dollar weighing 17 dwt. 6 gra., at the least," can be paid in gold coin. *Morris vs. Bancroft*, 277.

See **MORTGAGE**, 5.

MORTGAGE.

1. An assignment of mortgage being recorded under the act of April 9, 1849, is notice to subsequent purchasers. *Neide vs. Pennypacker*, 86.

2. Neide purchased a mortgage from Fox, who was acting as agent under letter of attorney from the mortgagee. Fox was a conveyancer and was usually employed by Neide in such matters. Neide had his assignment recorded and then left it and the mortgage in the hands of Fox to keep for him. Fox fraudulently claiming to still act under the letter of attorney from the mortgagee, assigned and delivered the mortgage to Pepper and absconded with the proceeds: *Semle*—The act of Neide in leaving the mortgage and letter of attorney in Fox's hands, was not, under the circumstances, such negligence as forfeited his title or postponed it to Pepper's. *Id.*

3. In an action for not entering satisfaction on a mortgage, the jury may and should consider whether the refusal to satisfy the mortgage was wanton and oppressive or the result of an honest doubt. *Haubert vs. Haworth*, 123.

4. An entry of satisfaction of a mortgage by the recorder on a certificate from the District Court that the judgment had been satisfied, does not discharge the lien of the mortgage, where the judgment had not been satisfied by the assignees of record of the mortgagee, but by the plaintiffs in the judgment, who were the original mortgagees. *Leech vs. Bonsall*, 204.

5. The holder of real estate subject to a mortgage is bound only to the condition stated in the recital contained in the mortgage. A mortgage recited "lawful money," the bond was for "lawful silver money:" *Held*, payable in lawful money of any description. *In re Eagle Beneficial Association*, 505.

6. Where a mortgage is satisfied by payment and receipt indorsed, parol evidence of any agreement contradicting the receipt not admissible. *In re H. M. Dunham*, 471.

7. Plaintiff being holder of second mortgage that was not the next lien, is not entitled to an assignment of first mortgage upon payment of it in full. *Bishop vs. Ogden*, 524.

MORTGAGE BONDS.

1. A master cannot go behind the decree of foreclosure in distributing a fund raised by the sale. He must distribute it to the parties entitled under the decree. *Rice vs. The Iron Co.*, 294.

2. Where there is no residue after the bondholders and lien creditors are satisfied, stockholders have no interests that need consideration. *Id.*

3. The master should consider and settle the titles of adverse claimants to bonds. *Id.*

4. A mortgage made to secure the payment of certain bonds is made for the benefit of the bondholders only, and no one can have an interest in the mortgage except as a bondholder. *Id.*

5. Creditors cannot inquire into the good faith of a transaction by the company, unless it covers a fraud intended to affect them. *Id.*

6. Where bonds are pledged as collateral, the holders have a right to receive the full amount of the bonds, and not only the face of their claims with interest, unless subsequent creditors can show a resulting interest in their debtor. The holders must be left to account to their principal for any balance that may be over the amount due to themselves. *Id.*

MORTGAGE BONDS—(Continued.)

7. A bond of this character, though not a technically negotiable paper, is practically so for all purposes of commerce. They pass by delivery, and may be sued by the holder in his own name. The burden of proof, therefore, is upon the party who alleges that they were not received in the ordinary course of trade, and for a valuable consideration. *Id.*

8. An auditor has no power to open or set aside a judgment. To him it is conclusive, and if creditors would attack it, they must resort to the proper court for that purpose. *Id.*

MUNICIPAL CLAIM. See **CITY OF PHILADELPHIA**, 1, 2, 4, 5, 17.**NAVIGABLE WATERS.**

1. The Federal Court will not enjoin the erection of a bridge over the Raritan river authorized by an act of the New Jersey Legislature, although it may completely intercept navigation, except as accommodated by draws, where Congress has not legislated on the subject. *Boston vs. The Railroad Co.*, 475.

2. The Federal Courts cannot be called on to prevent a wrong resulting from the exercise of the power of a State to erect bridges over its own navigable streams, until Congress has taken the initiative by enacting a commercial regulation with which the exercise of such a power is inconsistent. *Id.*

NEGLIGENCE.

1. An employer is bound to furnish to persons in his employ proper and safe machinery, tools and implements, to work with, and is responsible for injuries resulting from negligence in not doing so. *Mullen vs. Steamship Co.*, 16.

2. A head stevedore employed in unloading a cargo is fellow-servant with a stevedore employed under him, within the rule which exempts the employer from responsibility for an injury suffered by a servant from the negligence or carelessness of a fellow-servant. *Id.*

3. Where there is no dispute about the facts, alleged to constitute contributing negligence, the court may say as a question of law whether they amount to negligence or not. *Gramlich vs. Railroad Co.*, 78.

4. The act by plaintiff's servant of driving a loaded cart across the track of defendants, at a point where the ground was soft and heavy, and without any planking or other means of surmounting the rails, which projected above the ground, in consequence of which it became fast, and was struck by defendants' train, though the plaintiff had a right to cross there, was in itself negligence and barred recovery. *Id.*

5. Plaintiff, while repairing a public bridge, placed planks in such a position as to be thrown down by a passing vehicle; defendant in driving across the bridge threw them down and injured plaintiff: *Held*, not liable. *Pryor vs. Valer*, 95.

6. In an action against the city for damages from a sewer, where there was evidence that the city remedied the defect as soon as notified, and that it was in part occasioned by the improper construction of plaintiff's vault, the verdict will not be set aside as being against the evidence. *Gabrylewits vs. The City*, 271.

See **CITY OF PHILADELPHIA**, 19. **FORGED INSTRUMENTS.**

NEGOTIABILITY. **MORTGAGE BONDS**, 7.**NEW TRIAL.** See **LIFE INSURANCE**, 4.

1. A new trial will not be granted on the ground of counsel's absence, unless there be some evidence of merits presented. *Provattain vs. Townsend*, 233.

2. A new trial will not be granted on the ground of absence of counsel at the trial, unless it is shown clearly that a different aspect would have been presented if counsel had been present. *Brock vs. Richardson*, 233.

3. Where a party was taken entirely by surprise by an unexpected attack upon the character of one of his most important witnesses, which attack was made in the absence of the witness, and near the close of the trial, when there was no opportunity to repel it, a new trial was granted on that account. *Bishop vs. Lehman*, 112.

4. Where the plaintiff's statements as a witness were corroborated to a certain extent by papers which he produced, signed by the defendant, and the defendant was not examined himself, and offered no evidence, the jury having found a verdict for the defendant, a new trial was ordered. *Machette vs. Lessig*, 132.

5. Where it appeared that a witness of the party who obtained the verdict conversed with one of the jurors during the progress of the trial relative to matters connected with the case, and that the same juror after the jury had retired made

NEW TRIAL—(Continued.)

statements to his fellows of facts relating to the controversy which were not in evidence on the trial, a new trial was granted. *Simpson vs. Kent*, 30.

6. After verdict the exceptant, on a motion for a new trial, is confined to the grounds of error assigned at the trial. *Cooper vs. Abrahams*, 165.

ORPHAN ASYLUM.

Where a mother after the death of her husband, has placed her children under the charge of an orphan asylum, duly authorized to receive such children, upon her death their relatives have no right to interfere where there is no failure of duty on the part of the orphan asylum. *Comm. vs. Orphan Asylum*, 571.

ORPHANS' COURT.

1. The Orphans' Court has the power upon the settlement and distribution of the funds in the hands of an executor or administrator to frame an issue to determine the amount due on a judgment in another court. *Gordon's Estate*, 350.

2. The Orphans' Court has no jurisdiction to entertain bills by strangers to proceedings for specific performance of decedent's contract to rescind such decrees. *Remble*: That a purchaser of the legal title, for value, and without notice, prior to the proceedings for specific performance, would not be affected by them. *Raferty's Estate*, 336.

3. The Orphans' Court will not apportion commissions among executors. *Carnell's Estate*, 322.

4. The jurisdiction of the Orphans' Court is wholly statutory, and the facts in this case do not give it the power to grant a discovery. *Gaul's Estate*, 333.

5. A certiorari from Supreme Court will prevent further proceedings on attachment in Orphans' Court. *Shaw's Estate*, 347.

See ISSUE, 1. MINOR.

PARTNERSHIP.

1. When certain members of a partnership, who were also members of a previous firm which was indebted to the new firm, applied the assets of the new firm, without the consent of the partner therein, to the payment of the debt of their previous firm, they are in equity liable, jointly and severally, to their partner for his share of the assets thus misappropriated. *Wentworth vs. Raiguel*, 277.

2. The act of April 14, 1838, giving a remedy at law to parties who are partners of several firms against each other, did not take away the previously existing remedy in equity. *Id.*

3. The resulting interest of an individual partner in an unsettled partnership is not subject to attachment execution; and an attaching creditor cannot maintain a bill in equity for an account of the partnership affairs. *Alter vs. Brooke*, 258.

4. The attachment execution does not amount to a statutory assignment of the partner's interest. The bill is substitutional and not ancillary to the attachment. *Id.*

5. A surviving partner who has become lunatic is, notwithstanding his lunacy, entitled by his committee to the custody and control of the partnership property, and may sue for the recovery of debts due to the partnership. *Uberoth vs. The Bank*, 83.

6. In such suit the lunatic and his committee must both be joined as plaintiffs. *Id.*

7. A, residing and doing business in Philadelphia, entered into a special partnership with B, C, and D, residents and doing business in New York city, for one year; the partnership continued thereafter, but as its renewal was not advertised, A, by the New York law, became a general partner with the others. *Guillon vs. Peterson*, 225.

8. The other partners, contrary to the articles of copartnership, and without the knowledge of A, went into stock speculations with the trust funds of an estate of which B was one of the executors, and involved the estate in a large loss: Held, that a legatee of said estate could not recover against A for said loss. *Id.*

9. Notes drawn by one partner, in the firm name, apparently in the course of partnership business, without mala fides or actual knowledge by the holder of want of authority, or intended misapplication, entitle the holder to their allowance against the bankrupt estate of the firm. *Bush vs. Crawford*, 392.

10. A, a member of a partnership, offered B, for indorsement, his individual notes, representing, however, that they were to be used for purposes of the firm. B, refusing to indorse the same, A at B's suggestion substituted the firm notes, which B indorsed, and subsequently paid and became their holder: Held, that although it appeared that the notes, after said indorsement, were used by A to pay his

PARTNERSHIP—(Continued.)

separate indebtedness, and in fraud of his copartners, B might recover against the firm, there being no evidence of bad faith or actual knowledge by him of the intended fraud. *Id.*

11. The judgment recovered against a surviving partner is not evidence against the representatives of the deceased partner, for they were no parties to it. *Runkle vs. Phillips*, 619.

12. In actions by or against the surviving partner, the adverse party is a competent witness under the act of 1869; the representatives of the deceased partner not being parties to the action, are not bound by it, nor can the estate of such deceased partner be in any way affected by the judgment, either for good or for ill. *Id.*

PATENT.

1. Where the patent has expired, although an infringement is established, the decree will be for an account only. *Seymour vs. Marsh*, 380.

2. A license to use a process ceases with the death of the original patent, and the use after the patent is extended is an infringement. *Wetherill vs. The Zinc Co.*, 385.

3. An exclusive privilege to supply the licensor with articles to be manufactured upon a patented machine, under a license described as "personal," will not authorize the licensee to arrange with others for the manufacture and supply. *Houghton vs. Rowley*, 288.

4. A patentee while in defendants' employment made certain experiments at their expense, for the results of which he subsequently obtained a patent. Before this a contract was made between patentee and defendants for the manufacture for defendants of a certain number of articles afterwards so patented, and the transfer to defendants of the tools used in their manufacture: *Held*, that from these facts, a license to the defendants to continue the manufacture after patent must be conclusively presumed. *Chabot vs. The American Button-hole Co.*, 378.

5. Illustrative drawings of conceived ideas do not constitute an invention, and unless followed up by a seasonable observance of the requirements of the patent laws, they can have no effect upon a subsequently granted patent to another. *Reeves vs. Bridge Co.*, 368.

6. The patent of Reeves, June 17, 1862, for improved columns, braces, shafts, etc., is valid. *Id.*

7. A manufacturer of patented iron bars is not liable as an infringer, where the bars are used by others in constructing a bridge. *Bridge Co. vs. The Iron Co.*, 374.

8. The object and effect of McDowell patent of April 28, 1863, the form of construction, and mode of operation, differ essentially from those of Stuart & Wemys' patent for "improved guard-plates for stoves," dated May 18, 1868, and a license from McDowell is no defence to an action for infringement of the Stuart & Wemys' patent. *Stuart vs. Shantz*, 376.

9. A corporation may hold and work a patent; and a grant of letters patent from the Commonwealth of Pennsylvania incorporating the "Dorsey Revolving Harvester Rake Company," will be presumed to have been accepted. *The Rake Co. vs. Marsh*, 395.

10. The grant of a reissue by an acting commissioner of patents is valid, it is a judicial act, and it cannot be impeached, except for matter on its face, or in a proceeding for the purpose. *Id.*

11. The purpose of a reissued patent considered. The original and the reissue must harmonize. *Id.*

12. Terms imposed where the patentee may be protected by compensation. *Id.*

PLEADING.

1. A plea of defendant's bankruptcy should conclude with a verification. *Mayer vs. Gimbel*, 90.

2. Special pleas to the common counts in assumpsit held bad as amounting to the general issue. *Stotesbury vs. Insurance Co.*, 210.

3. A plea inconsistent with itself and repugnant, held bad on demurrer. *Id.*

4. Non assumpsit to the whole declaration and a tender as to part cannot be pleaded together. *Chew vs. Close*, 211.

5. A special plea which amounts to *non est factum*, and concludes with a verification, is bad. *Callicott vs. Freeman*, 209.

6. A conclusion of plea by a verification erroneous, where new matter is not introduced. *Ellis vs. Imperial Fire Insurance Co.*, 239.

7. Replication in confession and avoidance is bad. *Main vs. Bayard*, 239.

8. Demurrer to all the counts of a declaration, where one only is defective, overruled. *Johnson vs. Weber*, 241.

PLEADING—(Continued.)

9. Defendant's plea alleged that the insured had answered falsely the interrogatory in an application for life insurance, and averred that he had a certain disease of the lungs, etc. The replication set forth that insured "had no such disease, etc., with which the insurers ought to have been made acquainted." *Held*, A departure; plaintiff allowed to amend. *Scott vs. Insurance Co.*, 268.

10. A plea that plaintiff's cause of action was, in a former action by the defendant against the plaintiff, pleaded by the plaintiff as a set-off, and adjudicated in that action, is a plea in bar and not in abatement. *Palethorp vs. Whitaker*, 272.

PRACTICE. See ACTION. CONTINUANCE. COSTS. DEPOSITION. MECHANICS' LIEN. NEW TRIAL. REPLEVIN. SERVICE OF PROCESS. SHERIFF.

1. Where the plaintiff issued successively a summons which was returned "*nihil*," an *alias* summons which was returned "*nihil*" and a *pluries* summons which was returned "served:" *Held*, that having filed a copy of the instrument on which his suit was founded, within two weeks after the return of the *alias*, he was entitled to judgment for want of an affidavit of defence. *McInnis vs. Smith*, 222.

2. It is not necessary to bring in as parties the personal representatives of a deceased co-defendant. The death may be suggested of record, and the action continue against the survivor. *Machette vs. Magee*, 24.

3. A case will not be continued on account of the absence of the plaintiff, a material witness, where opportunity has been had to take his depositions. *Smith vs. Cunningham*, 96.

4. The duty of parties in regard to the service of subpoenas and taking depositions, and the cases in which continuance will be granted, considered. *Id.*

5. Where the *ca. sa.* against original defendant issued less than four days before the return day, and there was a return of *non est inventus*, motion for an *exoneretur* on the bail bond was refused. *Welsh and Wife vs. Mead*, 261.

6. The practice of the District Court will be adopted by the Supreme Court at Nisi Prius, in the absence of practice to the contrary in the latter court. *Id.*

7. A certiorari from the Supreme Court prevents the Orphans' Court from proceeding with an attachment. *Sarah Shaw's Estate*, 347.

8. The return to mandamus must be certain to a certain extent in general. *Comm. vs. Hancock*, 535.

PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. The fact that the maker of a promissory note resides at a different place and in a different State from the place at which the note is dated does not relieve the holder from the duty of demanding payment of the maker at his residence; and his neglect to do so, or to use due diligence to do so, discharges the indorser. *Browning vs. Armstrong*, 59.

2. Where the holder resided in that part of the city of Philadelphia known as the old city, and the indorser resided in Germantown: *Held*, that a notice of non-payment sent to the indorser through the United States mail, directed to him at Germantown, was sufficient. *Id.*

3. It is no defence to an accommodation note that it came into plaintiff's hands after maturity, if it came to him from one who acquired it for value before maturity. *Riegel vs. Cunningham*, 177.

4. The maker of a promissory note is by the form and effect of his contract a principal and cannot reduce his responsibility to the holder to that of a surety, by proof that he made the note for the accommodation of another party, and that that was well known to the holder at the time he received it. *Bank vs. Frazier*, 213.

5. Therefore the maker of a promissory note is not discharged from responsibility to the holder who discounted it for another person, by proof that the holder knew that the maker was an accommodation maker, and neglected to issue an execution upon a judgment which he held as a security for the note, when notified to do so by the maker. *Id.*

6. Defendants gave A, an employee, a note signed in blank. A left their service, and four years after transferred the note to plaintiffs, by whom these facts were known. Verdict for plaintiffs set aside. *Snyder vs. Armstrong*, 146.

7. A note given for claim, released by deed of composition, is fraudulent and no recovery can be had on it. *Callahan vs. Ackley*, 99.

See PARTNERSHIP, 9. DECEDENT, 2.

PROTHONOTARY.

The court will not hold the prothonotary to bail for misfeasance in respect to the election returns, except upon complaint made in the usual manner. *In re The Prothonotary*, 492.

See COSTS, 3.

RAILROAD.

1. An appeal may be taken from the report of viewers under the act of February 19, 1849, in all cases where the charter of the railroad company is subject to the provision of that act. *Lodge vs. Railroad Co.*, 543.

The verdict of the jury of view need not be itemized. *Id.*

An excessive verdict will be reduced. *Id.*

2. The charter of a railroad company authorized them to charge certain limited rates of toll to others for passage over the rails; but did not limit their charge for transportation by themselves. The absence of a limitation of the latter charge did not enable them, as common carriers, to make *unreasonable* charges. *Cambloss vs. Railroad Co.*, 411.

3. A statutory limitation of a railroad company's charges impliedly excludes, within the limit, any question of their unreasonableness, unless rebates from the maximum, or additions to, or rebates from any lower established rates, are *systematically* unequal. Here equality is understood in a relative sense, as importing that, under like circumstances, a like rate, according to weight or bulk, is charged to all persons for the carriage of goods which are of like descriptions for purposes of transportation. *Occasional* inequality, even though *preferential*, is not always *necessarily* unreasonable. But *systematic* relative inequality cannot be reasonable. *Id.*

4. The absolute monopoly of such a company, as owner of the road, includes only the profit from *tolls* properly so called. *Id.*

5. Any further monopoly is founded only in the great relative necessity, that, for the security of persons and property, a railroad company should have exclusive control of the motive power and of the track. *Id.*

6. The monopoly of the company, as a common carrier, depends wholly upon this relative necessity, and cannot be extended beyond its exigency. *Id.*

7. But the company may, as a common carrier, exercise any accessorial functions profitable to themselves and useful to the public. *Id.*

8. Freight which is transportable partly upon their own road, and partly beyond it, can be received by them as consigned for the ulterior destination. *Id.*

9. They may, as common carriers, engage in the accessorial business, with horsepower, of collecting freight which is to be transported upon their own railroad, and delivering freight at the places of destination. *Id.*

10. But they cannot monopolize wholly or partly this accessorial business, or promote the monopoly of it by any one else, or appropriate *preferential* advantages for conducting it, to their own profit, or to that of any one else. *Id.*

11. Express carriers are not, through any present magnitude, or prospective expansion of their business, entitled to any such preferential facilities or accommodations from a railroad company as would preclude or impede participation by the railroad company or by any of the public in conducting such business with equal advantage on any scale, great or small. *Id.*

12. The charge by a railroad company for such accessorial service with horsepower cannot be imposed upon any of the public who decline to use it. *Id.*

13. There is no difference between such a direct overcharge and an indirect one made by refusing abatement from a single aggregate charge which includes it. *Id.*

14. The charge of a railroad company for transporting packed parcels by rail, of the full sum which would be payable in the aggregate if they were not packed and were charged for severally, cannot be rightfully imposed upon the public generally, or upon express carriers or other middle men. *Id.*

REPLEVIN.

1. In replevin the sheriff is not bound to take any step in the execution of the writ until he is made secure by sureties and safe pledges, etc. The bond is a condition precedent. *Taylor vs. Express Co.*, 272.

2. The service of the writ on the defendants as a *summons* is void, and they are not bound to appear and plead. *Id.*

3. The entry of a general appearance in such case is not a waiver of the irregularity. *Id.*

REVERSAL OF DECISION.

1. When a court of last resort reverses one of its own decisions, the change of the law is retrospective, and makes the law at the time of the first decision as it is declared to be in the last decision. *Dunham's Case*, 471.

2. But the last decision only changes the law as to those transactions that can be reached by it, and in the absence of fraud, no contracts executed are disturbed by such retrospective action. *Id.*

REVIEW.

A bill of review will not be allowed where complainant alleges that he has discovered a writing, no proof of the contents of which had been offered at the trial, or any evidence presented that search had been made for it. *Conrad vs. Conrad*, 510.

SALE OF CHATTELS.

A sale in Maryland, of personal property by chattel mortgage, duly recorded, is valid against all persons without delivery of possession. *McCabe vs. Blymire*, 615.

The rule of the common law prevails in Pennsylvania, by which a sale of personal property, unaccompanied by delivery of possession, is void as against the intervening rights of creditors and purchasers. *Id.*

Between the parties to such Maryland chattel mortgage, a Pennsylvania court would enforce its validity. *Id.*

But where the mortgagee permits the mortgagor to retain possession of the property, and bring it into Pennsylvania and sell it to a *bona fide* purchaser, he loses all right to the property. *Id.*

SERVANT.

There is no custom to pay servants periodically. *McCarty's Estate*, 318.
See NEGLIGENCE, 2, 4.

SERVICE OF PROCESS.

1. Defendant came to this city by reason of a forged telegram, and was, on his arrival, served by deputy sheriff. The burden of proof is upon the plaintiff to explain how the deputy sheriff knew of his arrival. *Herener vs. Heist*, 274.

2. If defendant is decoyed into the jurisdiction of the court by the plaintiff, or by any one on his behalf, the service will be set aside. *Id.*

3. A party attending an equity cause before an examiner is privileged from the service of a summons. *Huddeson vs. Prizer*, 65.

SHERIFF.

1. The sheriff is liable for the custody of a defendant taken in execution under a *ca. sa.*, although the defendant is afterwards discharged by the decree of an insolvent court. *Hopkinson vs. Leeds*, 5.

2. The creditor has two concurrent remedies, and his appearance as a claimant in bankruptcy against the defendant does not affect his right to proceed against the sheriff for the escape. *Id.*

3. A sheriff is not liable for non-service upon a non-resident when he followed the instructions and directions of the plaintiff. *Hamilton vs. Lyle*, 98.

4. The court will not adjudicate the rights of claimants to a fund in the hands of the sheriff raised by an execution. The sheriff must distribute the fund himself at his own peril, or pay it into court. *Frcytog vs. Bamford*, 211.

5. The holding of an inquisition upon real estate levied under a *fiery facias* is a judicial act involving the exercise of judgment and discretion. The sheriff must, therefore, perform it himself; it cannot be done by his deputy. *Haberstroh vs. Tobey*, 614.

SHERIFF'S SALE.

Purchaser at sheriff's sale, whose interest is swept away by another sale under a paramount incumbrance, has a right to come in on the fund. *Jacoby's Estate*, 311.

SHIPPING.

1. **QUERE.**—Does a ship's husband stand in such a relation to the owners that his ratification of a loan to the master for the use of the ship is *prima facie* evidence against them? *Semble*, no. *Baring vs. Souder*, 20.

2. A laden boat which having no sail, oars, or other motive power of its own, is drawn by horses through a canal, and from thence through navigable waters of the United States, by a steamer, to a market, is not within the description of a ship or vessel in the act of Congress of 18th February, 1793, "for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." *The United States vs. The Canal-boat Ohio*, 448.

3. The applicability of the act is not, in this respect, enlarged or altered by the act of 20th of July, 1846, exempting such canal boats without masts or steam-power as were then by law required to be registered, licensed, or enrolled and licensed, from hospital dues and from official fees, etc.—or by the tonnage measurement act of the 6th of May, 1864—or by any other legislation of Congress in which the phrase *vessel*, or *ships and vessels*, may have been variously defined or applied. *Id.*

SHIPPING—(Continued.)

4. The board of health have not an unlimited arbitrary right to detain a vessel after there is no longer an appearance of malignant disease upon it. *Sumner vs. The City*, 408.

5. A consignee who has a right to designate where to discharge the cargo must select a suitable and safe place for its discharge. *Robbins vs. Welsh*, 409.

6. Freight allowed upon cargo destroyed. *The Juliet C. Clark vs. Welsh*, 469.

7. Wharfage is not recoverable in admiralty. *Storage Co. vs. The Thomas*, 364.

8. In the absence of contract, the *builders* of a vessel, furnishing material, are its *owners*; the law casts the ownership upon them. *Estate of The Reany Works*, 620.

9. The result may be varied by contract. The *builder* may waive the benefit of his position as respects *himself*. But if his secret waiver of this right may deprive the materialmen and mechanics of the privilege of treating him as owner, and thus defeat their liens, the act of assembly (13th June, 1836, sec. 1, Purdon's Digest, p. 62) would seem to be a delusion. *Id.*

10. In a contract for building a ship occurred the following provisions: "All payments made by the party of the second part (for whom the vessel was to be constructed) shall be considered as constituting ownership of ship so far as advanced." *Held*, that the language "so far as advanced," had reference to payments in advance of delivery, and did not relate to the vessel, nor transfer the ownership so far as the structure was completed. *Id.*

STATUTES. See CORPORATION, 1. CONSTITUTIONAL LAW.

STREETS. See CITY OF PHILADELPHIA, 1, 2, 3, 4, 5, 7, 8, 9.

SURETY.

1. Where an administrator had embezzled personal assets, and real estate was sold and applied to pay the debts, his sureties on his administration bond are liable to the heirs in an action on the bond. *Commonwealth et al. vs. Keil et al.*, 140.

2. A surety in a *capias* bond is not liable where the judgment is entered by agreement against one only of the defendants in the original suit, and the judgment being in effect converted into a contract to deliver stock. *Commonwealth to use vs. Clay*, 121.

3. A promise "to be responsible" for the contract of another is merely a guarantee and not a suretyship. *Bickel vs. Auner*, 499.

4. Action against surety on a paymaster's bond, where penalty of bond was \$20,000, and jury found verdict in favor of the government for \$25,679.42: *Held*, That the plaintiff was entitled to judgment for the penalty (\$20,000) of debt, and for the interest upon that sum in the nature of damages, from the commencement of the suit to the entry of the judgment; the aggregate amount not exceeding, however, the sum awarded by the verdict. *United States vs. Meeker*, 470.

See LANDLORD AND TENANT, 1, 5. EQUITY, 11.

TAXATION, STATE.

1. The act of April 24, 1874, for the taxation of corporations, does not repeal the 5th section of the act of May 1, 1868, either in terms or by implication; it only provides additional security for the payment of the State taxes. *Whelen vs. Railroad Co.*, 220.

2. In retaining the tax from dividends, the Catawissa Railroad Company must deduct it, *pro rata*, from the dividends on the old preferred and the new preferred stock. *Id.*

TAXATION, UNITED STATES.

1. An assessor of internal revenue has power to reassess the income tax of a citizen who has already paid the tax first assessed against him. *Doll vs. Evans*, 364.

2. The imposition of an addition of one hundred per centum as a penalty for the return of a false or fraudulent valuation is constitutional. *Id.*

3. Dividends declared and payable by railroad companies during the last five months of 1870 are not liable to taxation by the United States. A seizure by collector of United States revenue is illegal. *Reading Railroad Co. vs. Kenney*, 403.

TAX SALES. See VENDOR AND VENDEE, 5, 6.

TRADE MARK.

1. Property in the name of a trade or business has become as well established as in any other thing. *Winsor vs. Clyde*, 573.
2. Title to property in the name "KEYSTONE LINE," acquired by many years' certain exclusive appropriation and use of it by shippers of merchandise who did not own the vessels employed by them, will be protected in equity. *Id.*
3. The use of the name while the shippers were agents for a steamship company is a mere license and gives no right to its use after the agency is terminated. *Id.*

TRESPASS.

The building of a wall upon another's land is a continuing trespass, as long as the wall is unlawfully maintained there, and where a recovery has been had in an action of trespass for the erection of it, a new action of trespass may be brought for its maintenance, and the former recovery and satisfaction will be no defence as to any damages accruing after the issue of the writ in such action. *Dill vs. McCloskey*, 76.

TROVER.

1. Where there has been neither a tortious taking nor a tortious withholding of the plaintiff's goods he cannot maintain trover. *Bunting et al. vs. Dessau*, 31.
2. The plaintiff sold and delivered goods to the defendant, the delivery to be considered conditional until they were paid for within ten days. The plaintiffs not having demanded the goods at the expiration of the credit, and having delayed to make any demand until nearly a month afterwards, and the defendant having sold the goods in the meantime: *Held*, that the plaintiffs could not maintain trover against the defendant. *Id.*

TELEGRAPH COMPANY.

1. Actual notice of a regulation that telegraph company will not be liable for error in message, unless repeated, must be proved to excuse negligence. *Harris vs. The Telegraph Co.*, 88.
2. Whether the receiver of a telegram could be bound by such a rule discussed. *Id.*
3. A regulation that a telegraph company will not be responsible for the correctness of messages unless repeated, is not so far contrary to private interest or the public good, as to justify a court of justice in pronouncing it void. *Pasmore vs. The Telegraph Co.*, 98.
4. As to the time when a contract becomes binding, by letter or telegram, discussed. *Id.*

TRUST AND TRUSTEE.

1. The Common Pleas may appoint a successor to a trustee appointed by will, where it is a distinct and collateral trust and can be exercised independently of the executorship. *Anderson vs. Henszey*, 14.
2. Where duties are required of trustees, to invest, pay over, etc., and where the trust is for the use of a married woman for life, remainder to her children, the trust is alive and will be maintained. *Keene's Estate*, 339.
3. Trustees will only be appointed where the trusts require personal attention or active duty, or the exercise of a power. *Gaul's Estate*, 333.
4. A trust may exist though a trustee be not named. *Craige vs. Craige*, 545.
5. A clearly expressed intention of a testator who had the right of private dominion over his own property, should not be destroyed. *Id.*
6. Public policy demands, even in doubtful cases, the widest latitude of construction where the rights of married women are to be protected. *Id.*
7. A testator directed as follows: "I give and bequeath to each of my children an equal portion of my estate, that portion that will be for my daughters, Emily and Mulida, to be invested in safe securities, and the interest to be paid to them. Should either of them die without issue, then to be divided with my other heirs." At the date of the will and the death of testator, both daughters were married and are still covert: *Held*, that these expressions of the testator created an active operative trust for the married daughters' portions, the duties of which required constant activity on the part of the trustee. *Id.*
8. No attention is to be paid to the language of the will which declares that "should either of them (daughters) die without issue, then to be divided with my other heirs," because if a trust for the sole and separate use of these married daughters exists, their estate is an equitable one, and the rule in *Shelly's case* cannot apply. *Id.*
9. Where trust funds are invested in securities not recognized as legal investments, and not specifically bequeathed or given, the trustee has *prima facie* an

TRUST AND TRUSTEE—(Continued.)

implied power to change the investment, and a corporation permitting a proper transfer of such securities, upon a sale thereof by the trustee, is not liable for a breach of trust by him. *McMurtrie vs. Pennsylvania Co.*, 529.

10. The trustee cannot delegate his discretion either to another or to a co-trustee. And a corporation permitting a transfer of its stock, held as a trust investment, by one of two trustees transferring the same as trustee and as attorney in fact of a non-resident trustee, under a general power of attorney by which the whole management of the trust estate is delegated, is responsible for the consequences of a breach of trust by such trustee. *Id.*

11. Duties and liabilities of trustee discussed as to mixing trust funds, refusal to exhibit books, etc. *Seyfert's Estate*, 320.

12. Commission on corpus of trust fund reduced to one and a quarter per cent. *Hemphill's Estate*, 486.

See GUARDIAN. WILL, 2, 3, 4, 5, 13, 15, 18, 22.

VENDOR AND VENDEE.

1. The right of rescission cannot be exercised until every practicable means has been taken to restore things to their original position. *Bell vs. Hartman*, 1.

2. Purchaser is not obliged to make inquiries as to the title from one who, by deed duly acknowledged, has emphatically declared that his interest is at end. *Id.*

3. Where a purchaser of a farm agreed to make further payment on a resale: *Held*, that he was not bound to pay until he sold, nor to sell at a sacrifice. The power of an agent is limited to his employment. *Carson vs. Cochran*, 21.

4. A vendee of real estate, who has bargained for a good and marketable title, will not be compelled to accept the property if it is burthened with a building restriction which will impair its enjoyment or affect its marketable value. *Lealey vs. Morris*, 110.

5. Such a restriction created by the covenant of a former owner is not removed by a subsequent judicial sale for taxes. *Id.*

6. Whether a vendee is bound to accept a tax title *dubitatur*. *Id.*

7. It is not a defence to an action for the purchase-money that incumbrances or defects of title existed at the time of action brought, if, at the time of trial, they have been removed or cured. *Id.*

VOTERS.

Under the word "freemen" in the constitution of Pennsylvania, Article III., sec. 1, the right of voting is confined to citizens of the male sex. *Burnham vs. Luning*, 241.

WARRANT OF ARREST.

1. A warrant of arrest under act of July 12, 1842, can only be issued where the fraud alleged grows out of the fraudulent contraction of the debt. *Hamill vs. Rawlston & Co.*, 52.

2. In a proceeding on a warrant of arrest under the act of 1842, if there is a doubt of defendant's fraud, it is to go in his favor. *Artman vs. Bell*, 237.

3. Fraud is not to be presumed from the incorrectness of a defendant's expressed estimate of the value of his property. *Id.*

4. A composition between debtor and creditor shows a ratification of the sale of goods. *Id.*

5. An assignment for creditors is persuasive evidence that the assigned property was not bought with fraudulent intent. *Id.*

WAY.

1. A right of way appurtenant to land is appurtenant to every part of it, and if the owner divides it into several tracts, the grantee of each tract, however small, has an equal right of way over the servient land. *Walker vs. Gerhard*, 116.

2. The owner of land to which a right of way over other land is appurtenant, cannot enlarge his easement by the purchase of adjoining tracts, but the fact, that he is making an illegal or excessive use of the way in connection with the adjoining tracts, does not entitle the owner of the servient land to interrupt the way as to the original dominant land. *Id.*

3. The remedy is by action for the illegal or excessive use of the way. *Id.*

WHARFAGE.

1. Is not the subject of a libel in admiralty. The remedy in the common law courts is adequate. *Storage Co. vs. The Thomas*, 364.

WHARVES.

1. The court will not sanction the act of the board of wardens in granting a license to erect movable platforms. *Bailey's Appeal*, 506.
2. It is inequitable to the rights of adjoining dock-owners, to curtail the width of their docks by such structures. *Id.*
3. A lease from the city of a wharf and landing, does not give the tenant a right to store street dirt on its whole length, the wharf being part of the street. *Struthers et al. vs. Bickley et al.*, 539.

WIDOW. See **WILL**, 15, 16, 19, 20.

A widow electing to take her \$300 exemption out of real estate must proceed according to act of November 27, 1865. *Brennyflock's Estate*, 324.

WILL.

1. Probate of a written republication of a will must be the same as the proof required to establish the will. *Francis Smith's Will*, 362.
2. A testatrix devised an estate to her executors in trust, to pay the income to her son for life, the same not to be liable for the payment of his debts; and after the son's death, in trust, to transfer the property to his children, with remainder over in case the son should die without leaving issue: *Held*, that the income payable to the son was not liable to execution by his creditors. *Buckman vs. Wolbert, Executor*, 207.
3. A devise of a residuary estate in trust, one moiety to be conveyed to A on her attaining the age of twenty-eight years, the other moiety to B on his attaining the like age, with a gift over on either dying under that age, of his or her moiety, in trust for the survivor, gives a vested equitable estate to each, in order that the clear intent of the testator, that the issue, in the event of death under such age, leaving issue, should take, may be carried out. *Butler vs. Butler*, 269.
4. A limitation for the accumulation of income, until a minor attains the age of twenty-eight years, becomes void on his attaining full age, by the provisions of the ninth section of act of April 18, 1853, Pamph. L. 507. *Id.*
5. An evident intention that a devisee should not have possession and dominion over the principal of the estate, until he arrives at the age of twenty-eight years, is certainly lawful, and a trust created to give effect to such intention is an active trust. *Id.*
6. The bequest for missionary work in the diocese of Pennsylvania is a charity to be administered upon the enlarged and liberal principles which courts of equity have always applied to such trusts. *Board of Missions vs. The Society*, 279.
7. The meaning of a testator depends upon what his words meant at the time they were used. *Id.*
8. The plaintiffs in this case were not the persons referred to under the same name in the will. They are not competent to administer the trust. The defendants are competent. *Id.*
9. Construction of will—The word "or" read "and," to give effect to the manifest interest of the testator as gathered from the whole will. *Boyd's Estate*, 337.
10. A devise to "my daughter E., and her children—their children taking her mother's share," gives to the daughter a life-estate only, and not a fee. *Estate of Isaac R. Smith*, 248.
11. The words "leaving no issue," coupled with the words, "in case of the decease of either of them," would primarily be construed to mean not death at an indefinite time, but this rule may be made to bend before the intent of the testator. *Shiver's Estate*, 354.
12. Testator directed his burial lot to be improved. He owned no lot, but had selected one: *Held*, the *cy-pres* doctrine required the executor to bury him in and improve the selected lot. *Benison's Estate*, 355.
13. The will in this case held to create a trust for each of the children, which expired only on their respectively attaining the age of twenty-eight. *Dimond vs. Dimond*, 215.
14. An estate given to A for life with remainder to his children living at his death, or the issue of deceased children, gives A only an estate for life. *Gaul's Estate*, 333.
15. Under a direction in a will to pay over to testator's widow the whole income of two-thirds of his estate, devised in trust for his children, to be used and applied by her to the maintenance, support and education of the children, the whole income, however large, must be paid to the widow. *Biddle's Estate*, 324.
16. Whether the widow is entitled to a beneficial interest in such income. *Quare. Id.*

WILL—(Continued.)

17. Testator gave to his nephew an annuity of \$1000 during life, with a further provision that it should be paid to him in person only, on his personal application; and that if he should not so apply in five years, then such yearly sums uncalled for should fall into the residuary estate. The annuitant died just as he was starting on a voyage to claim his annuity, within the five years: *Held*, that the annuity was vested, and that the condition was a condition subsequent, made impossible by the act of God. The sums accrued were therefore awarded to the annuitant's administrator. *Hutchins' Estate*, 300.

18. Testator devised to his wife in trust for herself and children and after a certain time, "if the executor thinks it may be more productive, the property to be sold and the money divided." The parties by deed agreed to take the land as personalty, they lately have sold it, and a purchaser alleging title in the executor, asked the court to order him to convey: *Held*, that this was not a mere naked power, and the executor directed to convey to the purchaser any title held by him, and allowed \$1000 for his services. *Twaddell's Estate*, 316.

19. In a devise to a wife during life or widowhood, the widow is entitled to the custody of the personal estate on her giving security as required by the act of assembly. *Carnell's Estate*, 322.

20. The real estate vests in her also during life or widowhood, subject to the trusts for the maintenance and support of her children. *Id.*

21. A devise to a church by will, dated February 10, and the testator dying March 9, is void. *Id.*

22. A devise of real estate to trustees to pay net income to a son of testator for life, and after his death to such persons as would be entitled if the son had died intestate seized of the estate: *Held*, that although no estate vested in the son, his wife surviving him was entitled under the will to the income of one-third of this estate. *Binder's Estate*, 325.

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